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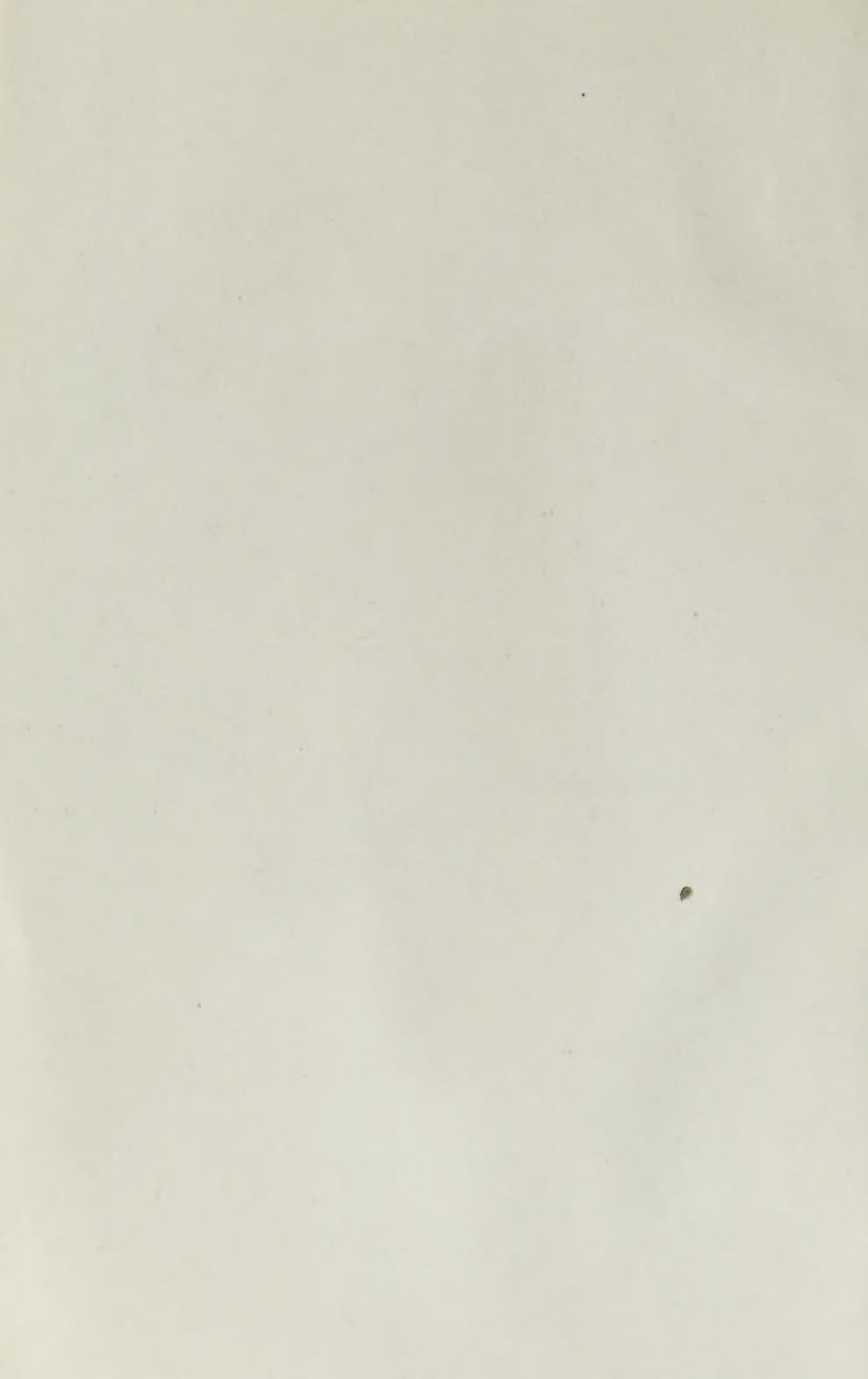
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United States
Circuit Court of Appeals

For the Ninth Circuit.

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff in Error,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant in Error.


Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Nevada.

Filed

AUG 3 - 1915

F. D. Monckton,
Clerk.



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United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,
vs.

WILLIAM B. POLAND and FREDERICK WILLIAM
LOW,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Alaska, Division No. 3.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the Second Judicial District Court of the State of
Nevada, in and for the County of Washoe.*

SIERRA LAND AND LIVESTOCK COMPANY,
a Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

Complaint.

Now comes the above-named plaintiff by J. A. Sanders and Summerfield & Richards, its attorneys, and complaining of the above-named defendant for cause of action alleges and shows to the court as follows, to wit:

I. That plaintiff now is, and at all times since on or about the 26th day of January, 1912, has been, a corporation duly created, organized and existing under and by virtue of the laws of the State of Nevada.

II. That defendant now is, and at all times since on or about the 27th day of January, 1906, has been, a corporation duly created, organized and existing under and by virtue of the laws of the State of Delaware.

III. That one W. W. Charles, residing at Tonopah, Nevada, now is the regularly appointed and duly authorized process agent of the defendant corporation, upon whom all legal process against said defendant corporation, or directed to said defendant corporation, can be served.

IV. That for more than one year continuously preceding the filing of this complaint the plaintiff has been engaged at various points and localities in the State of Nevada in the business of raising, purchasing, selling, grazing, shipping, driving and marketing, sheep and other livestock.

V. That for more than one year continuously preceding the filing of this complaint, the defendant corporation has been engaged in the business of milling and reducing gold and silver-bearing ores at and in the immediate vicinity of the town of Millers, Esmeralda County, Nevada, and [1*] in the use at said place and during all of said time, as a part of its said business, of large quantities of cyanide, and its chemical compounds, in reducing said gold and silver-bearing ores by it treated.

VI. That the said substance cyanide, and its chemical compounds and resultants, whether in solution or other form or forms, is a quickly acting, deadly and exceedingly virulent poison to all forms of animal life, and that at all times while defendant was so using said cyanide, its chemical compounds and resultants, defendant well knew that the same were quickly acting, deadly and exceedingly virulent poisons to all forms of animal life.

VII. That on the 5th day of February, 1914, at its said place of business at Millers, in Esmeralda County, Nevada, and for a long time continuously immediately preceding said date, defendant maintained and used artificial reservoirs, ponds, or pools,

*Page-number appearing at foot of page of Original Certified Transcript of Record.

for the purpose of impounding and retaining therein the cyanide, and its chemical compounds and resultants, whether in solution or in other form or forms, by it used in the reduction of gold or silver-bearing ores, but that said reservoirs, ponds, pools, and embankments and dams thereof, were at and during said time or times so negligently, carelessly, imperfectly and deficiently constructed, maintained and used by defendant, that they during said time and particularly on or about the 5th day of February, 1914, failed to impound and retain therein all of said cyanide, and its chemical compounds and resultants, whether in solution or in other form or forms, and because of said imperfect, deficient, negligent and careless construction, maintenance and use, of said reservoirs, ponds and pools, said defendant knowingly, willfully, carelessly, negligently and unlawfully, suffered and permitted large and highly dangerous quantities of said cyanide, and its chemical compounds and resultants, by it so used in the reduction of gold and silver-bearing ores, in solution and other form or forms, and knowing the same to be a quickly acting, deadly and exceedingly virulent poison to all forms of animal life, to escape from said reservoirs, ponds and pools, and from the premises occupied and used by said defendant in the reduction of said gold and silver-bearing ores, in solution and other form or forms, by flow from, [2] infiltrate from, seep from, and deposit from, said reservoirs, ponds and pools, and premises, to and upon a certain public highway in near proximity to said reservoirs, ponds and pools, and premises, and

to and upon the open unenclosed country in the immediate vicinity of, and adjoining said public highway.

VIII. That on or about the 5th day of February, 1914, while plaintiff was engaged in driving a flock of about 1600 head of sheep by it then owned, and to it belonging, upon and over the said public highway and the said open unenclosed country in near proximity to and adjacent to said public highway at Millers, Esmeralda County, Nevada, 1090 of said sheep at said time and place drank of water impregnated with cyanide, and its chemical compounds and resultants, and being to the knowledge of defendant a quickly acting, deadly and exceedingly virulent poison as aforesaid, and which had by reason of the willful, careless, negligent and unlawful maintenance and use of the reservoirs, ponds and pools, of defendant as aforesaid, and by reason of the careless and negligent management of the premises by it occupied and used in the reduction of gold and silver-bearing ores, knowingly, carelessly and negligently, caused and permitted by defendant to escape from said reservoirs, ponds and pools, and premises, of defendant to and upon said public highway, in the open unenclosed country in near proximity to and adjacent to said public highway, and that thereby and by reason thereof said 1090 of said sheep were poisoned and killed.

IX. That by reason of the said willful, negligent and careless acts and omissions of defendant as aforesaid in causing the death of said 1090 sheep

plaintiff has suffered general damages in the sum of \$6,540.00.

X. That by reason of the wanton and grossly negligent acts and omissions of defendant as aforesaid plaintiff prays judgment in its favor and against defendant for the sum of \$5,000.00 as exemplary damages in addition to its actual damages as aforesaid.

Wherefore, plaintiff demands and prays for judgment in its favor and against defendant for the sum of \$6,540.00 general damages, and the further sum of \$5,000.00 exemplary damages. [3]

J. A. SANDERS,

SUMMERFIELD & RICHARDS,

Attorneys for Plaintiff.

State of Nevada,

County of Washoe,—ss.

W. T. Holcomb, being first duly sworn, deposes and says, that he is the president of the Sierra Land and Livestock Company, a corporation, the plaintiff in said foregoing action; that he has heard read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true; that he verifies this complaint for and on behalf of the said plaintiff in the above and foregoing action.

W. T. HOLCOMB.

Subscribed and sworn to before me this 13th day of February, 1914.

[Seal]

JOHN T. READ,
Notary Public.

[Endorsed]: No. 10,319. In the Second Judicial District Court of the State of Nevada, in and for Washoe County. Sierra Land and Livestock Company, a corporation, Plaintiff, vs. Desert Power and Mill Company, a corporation, Defendant. Complaint. Filed this 13th day of Feb. 1914. W. A. Fogg, Clerk. By S. R. Tippet, Deputy. Summerfield & Richards, Reno, Nevada and J. A. Sanders. Attorneys for Plaintiff. Hon. Thomas F. Moran.

No. 1755. U. S. Dist. Court, Dist. Nevada. Filed April 11, 1914. T. J. Edwards, Clerk.

*In the Second Judicial District Court of the State of
Nevada, in and for the County of Nye.*

SIERRA LAND AND LIVESTOCK COMPANY.
a Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Corporation,

Defendant.

Summons.

The State of Nevada Sends Greeting to Said Defendant:

You are hereby summoned to appear within ten days after the service upon you of this summons, if

served in said county, or within [4] twenty days if served out of said county but within said judicial district, and in all other cases within forty days (exclusive of the day of service), and defend the above entitled action. Dated February 13, 1914.

J. A. SANDERS,

SUMMERFIELD & RICHARDS,

Attorneys for Plaintiff.

Sheriff's Return.

State of Nevada,

County of Nye,—ss.

I hereby certify and return that I received the within Summons on the 14th day of February, A. D. 1914, and that I personally served the same upon the within named defendant, Desert Power and Mill Company, a corporation, by showing the original Summons to W. W. Charles, appointed agent of defendant for service of process and delivering to W. W. Charles appointed agent of defendant for service of process a copy of the same, in Tonopah, Nye County, State of Nevada, on the 16th day of February, A. D. 1914, and I further return that I delivered to the said W. W. Charles appointed agent of defendant for service of process a certified copy of the complaint in the said within entitled action, with a copy of the summons attached, at the same time and place.

Dated this 16th day of February, A. A. 1914.

ED. MALLER,

Sheriff of Nye County, State of Nevada.

Deputy Sheriff,

[Endorsed]: No. 10,319. In the Second Judicial District Court of the State of Nevada, in and for Washoe County. Sierra Land and Livestock Company, a Corporation, Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant. Summons. Filed this 21 day of February, 1914. W. A. Fogg, Clerk. By F. K. Unsworth, Deputy Clerk.

No. 1755. U. S. District Court, Dist. Nevada. Filed April 11th, 1914. T. J. Edwards, Clerk.

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

Monday, March 23, 1914, 10:00 o'clock A. M.

Present: Hon. THOMAS F. MORAN, Judge. A. A. Burke, Sheriff. W. A. Fogg, Clerk. Lew Rogers, Official Reporter. * * * [5]

No. 10,319.

SIERRA LAND & LIVESTOCK CO., a Corp.,

vs.

DESERT POWER & MILL CO., a Corp.

[Order Granting Petition for Removal.]

Defendant's petition for removal of the above-entitled action to the United States District Court, in and for the District of Nevada, coming on regularly to be heard, the court being fully advised in the premises ordered that the petition be granted as prayed for, upon the defendant filing a good and sufficient bond, conditioned according to law, in the sum of \$300.00.

Whereupon a recess was taken until the further order of the Court.

District Judge.

[Endorsed]: No. 1755. U. S. Dist. Court, Dist. Nevada. Filed April 11th, 1914. T. J. Edwards, Clerk.

In the District Court of the United States, in and for the District of Nevada, Ninth Circuit.

No. —.

SIERRA LAND AND LIVESTOCK COMPANY a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

Demurrer [to Complaint].

Comes now the defendant above named, and, demurring to the complaint of plaintiff on file herein, for grounds of demurrer specifies:

I. That said complaint does not state facts sufficient to constitute a cause of action against defendant.

II. That said complaint is uncertain in this, that it is not stated therein, nor can it be ascertained therefrom, who is the owner of the open unenclosed country referred to in said complaint.

III. That said complaint is uncertain in this, that

it is not stated therein, nor can it be ascertained therefrom, whether the sheep referred to in said complaint were being driven upon and over the public highway [6] or upon and over the said open, unenclosed country at the time it is alleged said sheep drank of impregnated water.

IV. That said complaint is ambiguous in each and every particular wherein it is hereinabove alleged to be uncertain.

V. That said complaint is unintelligible in each and every particular wherein it is herein above alleged to be uncertain.

Wherefore defendant prays to be hence dismissed with its costs.

HUGH H. BROWN,
J. H. EVANS,

Attorneys for Defendant.

The undersigned attorneys for defendant, certify that the foregoing demurrer is well founded in point of law in their opinion and is not interposed for purposes of delay.

HUGH H. BROWN.
J. H. EVANS.

[Endorsed]: No. 1755. In the District Court of the United States in and for the District of Nevada. Sierra Land and Livestock Company, a corporation, Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant. Demurrer. Filed May 15, 1914. T. J. Edwards, Clerk. Hugh H. Brown, J. H. Evans, Attorneys for Defendant, Tonopah, Nevada.

*In the District Court of the United States, in and
for the District of Nevada, Ninth Circuit.*

No. 1755.

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

Answer.

Comes now the defendant above named and, answering plaintiff's complaint as amended by order of the above-entitled court, alleges, avers and denies as follows: First. I. Admits paragraph I. II. Admits paragraph II. III. Admits paragraph III. IV. Admits paragraph IV. V. Admits paragraph V. VI. Admits paragraph VI. VII. Denies paragraph VII.

But defendant alleges that ever since its mill was built it has [7] maintained and used for impounding the tailings from its mill at Millers, Nevada, for the purpose of holding said tailings temporarily, so that the same may at any time be retreated, a certain artificial pond which was constructed in as good, sufficient and workmanlike manner as is consistent with the locality and purpose for which it is intended, and maintained during all the times mentioned in said complaint in as good and sufficient con-

dition as possible; that the common practice of cyanide mills during the same period has been to allow the tailings to run at large without any pond being constructed and maintained; that the town of Millers, Nevada, where defendant's mill is located, lies in a flat where, since the building of said mill, no cattle nor sheep have been grazed or herded; that there is no running water nor pasturage near said town of Millers; that since said mill was built no sheep nor cattle have been driven near or through said town.

VIII. Denies paragraph VIII. IX. Denies paragraph IX.

Second. As and for a separate and first affirmative defense, defendant alleges: Upon information and belief this defendant alleges and avers that plaintiff corporation was not at the time of the alleged injury mentioned in said complaint engaged in driving the flock of sheep mentioned in said complaint, but that at said time and place, plaintiff corporation by and through its agents were engaged in herding, grazing and watering said sheep.

Defendant further alleges that the point at which said injury occurred was within three (3) miles of the postoffice of the town of Millers; that said town of Millers has a population of fifty (50) or more persons; and said sheep were not being driven to a railroad to be shipped or sheared; that by reason whereof the injury mentioned in said complaint was caused.

Third. As and for a separate and second affirm-

ative defense, defendant alleges: Upon information and belief this defendant alleges and avers that plaintiff corporation was not at the time of the alleged injury mentioned in said complaint engaged in driving the flock of sheep mentioned in said complaint, but that at said time and place, plaintiff corporation by and through its agents were engaged in herding, grazing and watering [8] said sheep.

Defendant further alleges that the land upon which said sheep were being grazed is the property of defendant corporation; that the said point at which said sheep were being herded, grazed and watered and said injury occurred is within one mile of a *bona fide* home or *bona fide* ranch house, to wit, all the homes in said town of Millers; that said land was not owned by the owners of said sheep; that said sheep at the time of being herded and grazed and of drinking said water were not being driven along any public highway; that by reason whereof the injury mentioned in said complaint was caused.

Fourth. As and for a separate and third affirmative defense, defendant alleges: Upon information and belief this defendant alleges and avers that plaintiff corporation was not at the time of the alleged injury mentioned in said complaint engaged in driving the flock of sheep mentioned in said complaint, but that at said time and place, plaintiff corporation by and through its agents were engaged in herding, grazing and watering said sheep.

The defendant further alleges that the place at which said sheep drank said water is within the ordi-

nary limits of said town of Millers as defined by section 2328 of the Revised Laws of the State of Nevada; that by reason whereof the injury mentioned in said complaint was caused.

Fifth. As and for a separate and fourth affirmative defense, defendant alleges: Upon information and belief this defendant alleges and avers that plaintiff corporation was not at the time of the alleged injury mentioned in said complaint engaged in driving the flock of sheep mentioned in said complaint, but that at said time and place, plaintiff corporation by and through its agents were engaged in herding, grazing and watering said sheep.

Defendant further alleges that the land upon which said sheep were being herded, grazed and watered is the property of the defendant corporation; that before herding, grazing and watering said sheep the owners thereof, the plaintiff corporation, did not first obtain the consent of defendant corporation, so to herd, graze and water said sheep; that defendant has the legal title to said land, to wit, patent from the United States [9] Government duly recorded in the records in the County Recorder's office at Goldfield, Esmeralda County, Nevada; that said land upon which said injury occurred is not a range or common; that by reason whereof the injury mentioned in said complaint was caused.

Sixth. As and for a separate and fifth affirmative defense, defendant alleges: Upon information and belief this defendant alleges and avers that plaintiff

corporation was not at the time of the alleged injury mentioned in said complaint engaged in driving the flock of sheep mentioned in said complaint, but that at said time and place, plaintiff corporation by and through its agents were engaged in herding, grazing and watering said sheep.

Defendant further alleges that the sheep mentioned in plaintiff's complaint were being moved from one county to another in this state, to wit, were being moved from Lida, Esmeralda County to Rawhide, Mineral County; that before moving said sheep from one county to another plaintiff corporation did not first obtain from the lawful inspector a traveling permit.

Seventh. As and for a separate and sixth affirmative defense, defendant alleges: That as the defendant is informed and believes, and upon such information and belief states the fact to be, the plaintiff herein is not entitled to have or maintain his complaint or action herein, for in that said plaintiff at all times in said complaint mentioned employed as its agent an old and experienced herder who was thoroughly familiar with the country in and about Millers or Tonopah, Nevada, who had formerly been employed in or about Millers or Tonopah, and was thoroughly cognizant of the danger of cyanide being in any water in and around said town of Millers and Tonopah and notwithstanding said knowledge wilfully and deliberately took the sheep of plaintiff for the purpose of giving them water from the camp of plaintiff to and *ever* the lands of defendant to said

pool of water lying on the land of defendant, which plaintiff, through its herder, knew was in close proximity to the defendant's tailings pond, reservoir or dam referred to in plaintiff's complaint, and by reason of the actions of said herder the plaintiff herein assumed all and singular the risks of [10] taking said sheep from its camp for the purpose of watering them to and over the lands of defendant, to said water and the drinking of said water by plaintiff's sheep.

Eighth. As and for a separate and seventh affirmative defense, defendant alleges: That as the defendant is informed and believes, and upon such information and belief states the fact to be, the plaintiff herein is not entitled to have or maintain his complaint or action herein, for in that said plaintiff at all times in said complaint mentioned employed as its agent an old and experienced herder who was thoroughly familiar with the country in and about Millers and Tonopah, Nevada, who had formerly been employed in or about Millers or Tonopah, and was thoroughly cognizant of the danger of cyanide being in any water in and around said towns of Millers and Tonopah and notwithstanding said knowledge carelessly and negligently drove the sheep of plaintiff for the purpose of giving them water from the camp of plaintiff to and *ever* the lands of defendant to said pool of water lying in the alleged public highway and on the land of defendant, which plaintiff, through its herder, knew was in close proximity to the defendant's tailings pond, reservoir or dam

referred to in plaintiff's complaint, which said carelessness and negligence of plaintiff's herder were the sole and only proximate causes of the injuries sustained by plaintiff.

Ninth. As and for a separate and eighth affirmative defense, defendant alleges: That prior to the drinking of the water by plaintiff's sheep, set forth in plaintiff's complaint, the herder of plaintiff in charge of said sheep was warned by various persons in and about the towns of Millers and Tonopah that any water to be found in close proximity to said towns of Millers and Tonopah might be impregnated with and contain cyanide in one or the other of its forms; that notwithstanding said warnings said plaintiff's herder wilfully and deliberately drove plaintiff's sheep from its camp to the place where said water was lying on defendant's land; in consequence whereof defendant alleges that plaintiff assumed all and singular the risks incurred by plaintiff's herder.

Tenth. As and for a separate and ninth affirmative defense, defendant alleges: That prior to the drinking of the water impregnated with [11] cyanide by plaintiff's sheep, set forth in plaintiff's complaint, the herder of plaintiff in charge of said sheep was warned by various persons in and about the town of Millers that any water to be found in close proximity to said town of Millers might be impregnated with and contain cyanide in one or the other of its forms; that notwithstanding said warnings said plaintiff's herder carelessly and negligently

drove plaintiff's sheep from its camp to the place where said water was lying in the alleged public highway and on defendant's land, in consequence whereof defendant alleges that the carelessness and negligence of plaintiff's herder were the sole and only proximate causes of plaintiff's injuries.

Eleventh. As and for a separate and tenth affirmative defense, defendant alleges: That plaintiff recovered a certain sum, the exact amount of which is not at the present time known to defendant, from the sale of the pelts of the sheep referred to in plaintiff's complaint.

Wherefore, defendant, having fully answered plaintiff's complaint, prays to be hence dismissed with its costs.

HUGH H. BROWN,
J. H. EVANS,
Attorneys for Defendant.

State of Nevada,
County of Nye,—ss.

J. H. Evans, being first duly sworn according to law, says: That he is one of the attorneys for the above-named defendant, Desert Power and Mill Company, a corporation; that there are no officers of said defendant corporation at the present time within the State of Nevada, and that by reason thereof this affiant makes this verification, as such attorney, and for and on behalf of said defendant; that affiant has read the above and foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated

on information and belief, and as to those matters, he believes it to be true.

J. H. EVANS.

Subscribed and sworn to before me, this 7th day of July, 1914.

[Seal]

S. R. MOORE,

Notary Public in and for Nye County, Nevada.

My commission expires Augt., 1916. [12]

[Indorsed] No. 1755. In the District Court of the United States in and for the District of Nevada. Sierra Land and Livestock Company, a Corporation, Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant. Answer. Filed July 9th, 1914. T. J. Edwards, Clerk. Hugh H. Brown, J. H. Evans, Attorneys for Defendant, Tonopah, Nevada.

In the District Court of the United States, in and for the District of Nevada, Ninth Circuit.

No. —.

SIERRA LAND & LIVESTOCK COMPANY (a Corporation),

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY (a Corporation),

Defendant.

Stipulation [Waiving Jury, etc.].

It is hereby stipulated by and between the plaintiff and defendant herein, as follows:

1. A jury is hereby waived.

2. The above-entitled cause may be set for trial on November 15th, 1914, or as soon thereafter as the Court may be able to hear the same.

Dated Tonopah, Nevada, September 22, 1914.

J. SANDERS,

SUMMERFIELD & RICHARDS,

Attorneys for Plaintiff.

HUGH H. BROWN,

J. H. EVANS,

Attorneys for Defendant.

[Indorsed]: No. 1755. In the District Court of the United States in and for the District of Nevada. Sierra Land and Livestock Company, a Corporation, Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant. Stipulation Waiving Jury and as to Time of Trial. Filed September 25th, 1914. T. J. Edwards, Clerk. Hugh H. Brown, J. H. Evans, Attorneys for Defendant. Tonopah, Nevada.

*In the District Court of the United States, in and for
the District of Nevada. [13]*

No. 1775.

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

Notice of Declination to Amend.

To the Above-entitled Court, and to Hugh H. Brown
and J. H. Evans, Attorneys for the Above-named
Defendant:

You and each of you will please take notice that the plaintiff declines to amend its complaint with reference to the order of the above-entitled court of striking out of plaintiff's complaint all of paragraph X and the last line of the prayer contained in said complaint, and that plaintiff demands that defendant, within the time mentioned in the decision of the Court, plead to the merits of the case with the elimination indicated by the opinion of the Court to strike therefrom.

SUMMERFIELD & RICHARDS,
Attorneys for Plaintiff.

[Indorsed]: No. 1755. In the District Court of the United States, in and for the District of Nevada. Sierra Land and Livestock Company, a Corporation, Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant. Notice of Declination to Amend. Filed June 25, 1914. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Summerfield & Richards, Attorneys at Law, Reno, Nevada.

Minutes of Court of date June 20th, 1914, showing disposition of Demurrer:

[Order Overruling Demurrer.]

“SIERRA LAND & LIVESTOCK CO.,

vs.

DESERT POWER CO.

The demurrer and motion to strike having been duly considered by the Court, it is now ordered that the demurrer be and is hereby overruled.” * * *

[Finding.]

*In the District Court of the United States for the
District of Nevada.*

No. 1755.

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant. [14]

This cause came on regularly for trial at the present term before the Court, a jury having been waived by the written stipulation of counsel, filed herein.

The parties appeared by their attorneys, introduced their proofs, oral and documentary, and after

argument of counsel the cause was submitted for decision.

And the Court having duly considered the premises finds the issue in favor of the defendant.

Let judgment be entered accordingly, with costs.

Dated, January 23d, 1915.

E. S. FARRINGTON,

Judge.

[Indorsed]: No. 1755. U. S. Dist. Court, Dist. Nevada. Sierra L. & L. S. Co., v. Desert Power & Mill Co. Findings. Filed Jany. 23d, 1915. T. J. Edwards, Clerk.

[Judgment.]

*In the District Court of the United States for the
District of Nevada.*

No. 1755.

October Term, 1914.

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

This cause comes on regularly for trial at this term before the Court, a jury having been waived by the written stipulation of counsel filed herein. The parties appeared by their attorneys, introduced their

evidence, oral and documentary, and argued and submitted the same for the consideration of the Court. And the Court having filed its findings in favor of the defendant and ordered judgment to be entered in accordance therewith, with costs:

It is therefore ordered that the plaintiff take nothing by its complaint herein, and that the defendant have and recover of and from the plaintiff [15] its taxable costs amounting to \$——.

Dated, January 23d, 1915.

Attest: T. J. EDWARDS,
Clerk.

**[Certificate of Clerk U. S. District Court to
Judgment and Judgment-roll.]**

United States of America,
District of Nevada,—ss.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the above and foregoing is a full, true and correct copy of the original judgment now on file and of record in my office, and that the foregoing, with this certificate, is the Judgment-roll in said cause.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said court, at my office in Carson City, this, the 23d day of January, A. D. 1915, and in the year of our Independence the 139th.

[Seal]

T. J. EDWARDS,
Clerk.

(10¢ Rev. Stamp.)

[Indorsed]: No. 1755. U. S. Dist. Court, Dist. Nevada. Sierra Land & Livestock Company, a Corporation, vs. Desert Power & Mill Co., a Corporation, Judgment-roll. Filed January 23d, 1915. T. J. Edwards, Clerk. [16]

[Opinion on Demurrer and Motion to Strike.]

*In the District Court of the United States, in and for
the District of Nevada.*

No. 1755.

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

J. A. SANDERS, SUMMERFIELD & RICH-
ARDS, for Plaintiff.

HUGH H. BROWN, J. H. EVANS, for Defend-
ant.

FARRINGTON, District Judge:

This matter came up on defendant's demurrer and motion to strike, interposed to plaintiff's complaint. It is alleged that defendant at the time of the injury complained of was engaged in milling and reducing gold and silver-bearing ores, in the vicinity of the town of Millers, Esmeralda County, Nevada. In treating these products, defendant customarily made

use of large quantities of cyanide, and had erected, and was then maintaining reservoirs and embankments for the purpose of impounding the cyanide in solution, and in such other forms as it might occur after passing out of the mills. It is alleged that cyanide is a quickly acting, deadly and exceedingly virulent poison, and that this fact was well known to defendant; that the reservoirs and embankments were so negligently, carelessly and imperfectly constructed, maintained and used that on the 5th day of February, 1914, they failed to retain all the cyanide, and that defendant knowingly, willfully, carelessly, negligently and unlawfully suffered and permitted large and highly dangerous quantities of cyanide in solution, and in other forms, to escape from said reservoirs, and from the premises then occupied and used by defendant's [17] reduction works, to and upon the public highway, and to and upon the uninclosed country in the immediate vicinity of and adjoining said highway. On that day, while plaintiff was engaged in driving a flock of about 1,600 sheep over the highway, and the open, uninclosed country adjacent thereto 1,090 of said sheep drank of the water impregnated with cyanide, and were poisoned and killed, to plaintiff's damage in the sum of \$6,540.00. Finally, by reason of the wanton, careless and negligent acts and omissions of defendant, as aforesaid, plaintiff prays judgment in its favor and against defendant, for the sum of \$5,000.00 exemplary damages in addition to the \$6,540.00 actual damages, as aforesaid.

It was certainly negligent on the part of defendant to knowingly permit water holding cyanide in solution, to escape from its premises on to the public highway, and on to the uninclosed lands adjacent thereto. This, I think, would be true irrespective of the ownership of such adjacent lands.

Haughley v. Hart, 62 Iowa, 96.

If, as counsel stated in the argument, these lands belonged to defendant, that fact standing alone, would not be sufficient to defeat plaintiff's recovery.

8 Thompson on Negligence, Sec. 718.

Furthermore, defendant's ownership of the land was a fact peculiarly within its own knowledge. Determination of the title by plaintiff might require a survey of the land, as well as a careful examination of the records in the county recorder's office, the State land office, and the United States Land Office.

It is an old and well-established rule that matter more in the knowledge of one party than the other, must be pleaded by the party having the knowledge, unless its affirmation is so essential to the right of recovery that without it no cause of action is stated.

Owens v. Geiger, 22 Am. Dec. 435;

Reed v. Louisville & Nashville R. R. Co., 44 L. R. A. 823. [18]

It is alleged, in effect, that the sheep were being driven along a public highway, and on the uninclosed adjacent lands, when they were poisoned. My attention has been called to no statute of this State which makes it unlawful to so drive sheep. True, it

is a misdemeanor to move sheep from one county to another without a permit (Rev. Stats., Sec. 2308), or to herd or graze sheep on any unoccupied land within a radius of three miles of the postoffice of any town having a population of fifty or more (Sec. 2317). It is also unlawful to herd or graze sheep on the lands or possessory claims of another, or within a mile of a *bona fide* home or ranch-house (Sec. 2319).

The complaint, however, nowhere shows that the sheep were being driven from one county to another, or that they were being herded or grazed, as distinguished from driven. Neither is it alleged that the sheep were being herded or grazed on the highway, or on the adjacent land. If this were the fact, it is a matter of defense. If, as counsel contended during the argument, the fact that sheep pause to drink, is sufficient to characterize the movement as grazing rather than driving, then driving a bank of livestock where there is water or feed of any description, becomes an impossibility unless each animal is muzzled. By the terms "graze" and "herd" we are to understand an intentional retaining or holding of sheep on land for the purpose of pasturage, and in each of the statutes referred to, the wrong sought to be prevented is depasturing land belonging to others, or in the vicinity of villages, towns, or farm-houses. There was no intention to prevent the transportation or driving of sheep from one point to another within a county.

The allegation of injury in the complaint, in substance is, that by reason of the willful, careless, neg-

ligent and unlawful maintenance of the reservoirs, and by reason of the careless and negligent maintenance of the premises, cyanide was knowingly, carelessly and negligently caused and permitted by defendant to escape from said reservoirs to and upon the public highway and adjacent land. This is no more than a charge of ordinary negligence. It was the failure to perform a duty [19] which the defendant owed to persons using the highway. There is no charge of wanton, malicious, or positive wrongdoing, which is necessary in order to warrant the recovery of vindictive damages.

International & G. N. Ry. Co. v. Garcia, 7 S. W. 802.

In *Railway Company vs. Prentice*, 147 U. S., 101, 115, the Supreme Court quotes with approval the following language from *Gleghorn v. New York Central Railroad*, 56 N. Y. 44, 47, 48:

“For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages, unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a

criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified."

In *Milwaukee v. St. Paul Ry. Co. v. Arms*, 91 U. S. 489, 495, it was held error to instruct the jury thus: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiffs punitive or [20] exemplary damages." The Court said that "Failure of the employees to use the care that was required to avoid the accident," whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury inflicted. To do this, there must be willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences.

While it is unnecessary in cases of this kind to claim exemplary damages in express terms, it is

necessary to allege and prove facts sufficient to warrant such a recovery. This is the only conclusion which I can draw from Judge Hawley's opinion in *Peers vs. Nevada Power, Light & Water Co.*, 119 Fed. 400, 403, where it is said:

"In actions to recover damages for injuries received, the decided weight of the authorities is to the effect that it is not absolutely necessary, although it is held in several cases to be the better practice, that plaintiff should set out in his complaint that he claims some or all of his damages to be punitive. It is sufficient if he makes a case by his pleading and proof upon the trial which will, under the law, entitle him to exemplary damages.

Savannah etc. R. R. Co. v. Holland, 14 Am. St.

Rep. 158, 161;

6 Thompson on Negligence, Sec. 7609;

13 Cyc., 177.

The demurrer will be overruled. The motion to strike will be granted. However, plaintiff, if it desires to do so, will be allowed twenty days within which to amend.

[Indorsed]: No. 1755. In the District Court of the United States, in and for the District of Nevada. Sierra Land and Livestock Company, a Corporation, Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant. Opinion on Demurrer and Motion to Strike. Filed June 19th, 1914. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [21]

[Opinion.]

*In the District Court of the United States, in and for
the District of Nevada.*

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

Mr. J. A. SANDERS and SUMMERFIELD &
RICHARDS, for Plaintiff.

Mr. HUGH H. BROWN and Mr. J. H. EVANS,
for Defendant.

FARRINGTON, District Judge:

In this action plaintiff seeks to recover for the death of 1,095 head of sheep poisoned by cyanide which had escaped from defendant's milling and reduction works near the town of Millers, Esmeralda County, Nevada. The accident occurred on the 5th day of February, 1914.

Defendant's mill is situated on a side hill; below it are extensive reservoirs and embankments to retain the slimes issuing therefrom, and below these is a flat across which passes a road leading to the north from Millers. The road has been used by the public generally for a number of years, but no steps have ever been taken, as prescribed by the statute, to make it a legal highway. At the time of the accident

the sheep were being driven, not along this road, but onto it from the east, and they died immediately after drinking water then standing in the ruts. The spot where this took place is about 800 feet from the nearest reservoir or embankment, and entirely on uninclosed land belonging to defendant. It was also within a mile of the postoffice at Millers, and within the same distance of a *bona fide* home owned and occupied by Samuel Fickes. There is, however, no evidence that the sheep were herded or grazed on defendant's land, or anywhere else on the day mentioned. Their ultimate destination was some point outside [22] Esmeralda County, and they were being driven without a travelling permit. When or where they were to cross the county line is not clear from the evidence. The absence of a travelling permit, however, was not a cause contributing to the accident.

The embankments were constructed of dry, or partially dry, slimes, and broke frequently. When a break occurred at or near the east end of the reservoir, the liquid slimes, more or less impregnated with cyanide, naturally ran down the side hill to the flat, and toward the road where the sheep were poisoned. No precautions appear to have been taken to prevent the water, once released or breaking out of the main reservoir, from going as far as its volume and the slope of the country would permit.

Although a number of witnesses testified to the contrary, I am satisfied that a second line of embankments placed at a reasonable distance below the main

[Opinion.]

*In the District Court of the United States, in and for
the District of Nevada.*

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

Mr. J. A. SANDERS and SUMMERFIELD &
RICHARDS, for Plaintiff.

Mr. HUGH H. BROWN and Mr. J. H. EVANS,
for Defendant.

FARRINGTON, District Judge:

In this action plaintiff seeks to recover for the death of 1,095 head of sheep poisoned by cyanide which had escaped from defendant's milling and reduction works near the town of Millers, Esmeralda County, Nevada. The accident occurred on the 5th day of February, 1914.

Defendant's mill is situated on a side hill; below it are extensive reservoirs and embankments to retain the slimes issuing therefrom, and below these is a flat across which passes a road leading to the north from Millers. The road has been used by the public generally for a number of years, but no steps have ever been taken, as prescribed by the statute, to make it a legal highway. At the time of the accident

the sheep were being driven, not along this road, but onto it from the east, and they died immediately after drinking water then standing in the ruts. The spot where this took place is about 800 feet from the nearest reservoir or embankment, and entirely on uninclosed land belonging to defendant. It was also within a mile of the postoffice at Millers, and within the same distance of a *bona fide* home owned and occupied by Samuel Fickes. There is, however, no evidence that the sheep were herded or grazed on defendant's land, or anywhere else on the day mentioned. Their ultimate destination was some point outside [22] Esmeralda County, and they were being driven without a travelling permit. When or where they were to cross the county line is not clear from the evidence. The absence of a travelling permit, however, was not a cause contributing to the accident.

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Although a number of witnesses testified to the contrary, I am satisfied that a second line of embankments placed at a reasonable distance below the main

embankment, would have been sufficient to arrest and retain the tailings escaping from time to time; and had this been surrounded by a fence, there could have been little or no danger to livestock, whether ranging in that vicinity or driven along the road.

The discharges from a cyanide-mill like the one in question are highly poisonous, and it was the duty of defendant to take every reasonable precaution to prevent injury to those who were passing over the road. This duty, in my opinion, defendant failed to perform. Under all the circumstances in evidence, it is futile for defendant to plead ignorance of the fact that the road was in common use, or to urge that any one using it as a thoroughfare was in any sense a trespasser. Such indifference to the safety of livestock, not to say human beings, passing over the road, is far from commendable.

The precautions taken were admirably adapted to preserve the slimes at a minimum of expense. It was reasonable, however, to expect that any water escaping would be charged with cyanide of potassium; that it would remain in the water after the pulp and course material had been [23] precipitated. No effort was ever made to recapture this cyanide water, or to prevent it from reaching the road. In this defendant was negligent, and if there were no more to the case, there should be a judgment for plaintiff.

It appears, however, that the sheep were under control and direction of plaintiff's agent, William C. McGarry. When McGarry arrived at Millers he

made *injury* of a number of persons as to whether the water in the flat below the mill was wholesome. Bert Acree told him he thought it was rain water, but advised him to take no chances, and suggested that he had better take his sheep to the lake, three miles southwest of Millers, where the water and feed were good. This is testified to both by Acree and Bohannan. Sam Floathe told McGarry to be sure to keep his sheep on the south side of the track, as they were likely, if they were taken to the north side, to get into the cyanide, and all be lost. In using the word "track" Floathe referred to the track of the Tonopah & Goldfield Railroad, which ran about east and west through Millers station.

Samuel Fickes, when asked about the water, told McGarry he was not sure, but there might be cyanide in it. Dan McNaughton heard McGarry say that he would like to stay around Millers, but was afraid of the cyanide. These warnings were all given on the 4th of February, the day before the accident. The failure to heed them was contributory negligence, and sufficient to preclude a recovery.

In a case like this the law did not require defendant to take better care of plaintiff than it required plaintiff to take of itself. It is a well-established principle that one who directly and negligently contributes to his own injury cannot recover damages from another whose negligence concurred in causing it. This rule, however, is subject to qualification. Plaintiff cannot be held guilty of contributory negligence in driving his sheep to the water unless he knew and appreciated, or under all the circum-

stances, ought to have known and appreciated the danger.

The presence of the cyanide mill itself was a danger sign. McGarry [24] was warned at least three times by three different persons on the day before the accident. Common, ordinary prudence demanded that he test the water before driving his sheep to it, or that he take the sheep to the lake three miles southwest of Millers.

It is urged very strongly that there could have been no contributory negligence within the meaning of the law, unless McGarry actually knew the water was sufficiently poisonous to kill or injury his sheep. My attention has been called to no authority which supports such a proposition.

A failure under ordinary circumstances to make diligent use of available means of information to avoid a known or apprehended danger, when it is apparent if such means had been used the danger would have been avoided, is regarded as contributory negligence.

2 Jaggard on Torts, p. 996.

In *White vs. People's Railway Co.*, 72 Atl., pp. 1059, 1061, it was held that "A pedestrian lawfully using a street is not bound to hunt for patent dangers but he may presume that the street is in a reasonable safe condition in the absence of any knowledge to the contrary. But where he knows of the existence of a danger, or ought to know of it, and with such knowledge voluntarily runs into the danger, he is guilty of contributory negligence."

The same principle is applied in those cases so frequently found in the books, where suit is brought to recover for injuries received at a railroad crossing. Undoubtedly if the injured person had known and appreciated the danger from an approaching train, he would not have attempted to cross the track. Nevertheless, such persons have frequently been refused a recovery, and held guilty of contributory negligence, because they failed to look and listen before attempting to cross the track. In other words, they are held responsible, not merely for their actual knowledge, but for knowledge which they ought to have had under the circumstances. None of the cases cited by plaintiff are at variance with these views. [25]

In *Beinhorn vs. Griswold*, 69 Pac. 557, the defendant in conducting his mining operations, kept in vats on the surface of his mine, large quantities of cyanide of potassium diluted with water. The vats were not enclosed with a fence, or sufficiently covered. Plaintiff's cattle, ranging on the public domain in the vicinity, strayed onto the premises, drank out of the vats, and were poisoned. It was held that the defendant was not guilty of any neglect of duty in failing to prevent the cattle from going onto his unfenced field. He was, of course, bound to refrain from intentional or wanton injury to the cattle, but otherwise he was under no active duty in respect to them. The court said the record did not justify an application of the doctrine of invitation, and held that the testimony was not sufficient to

make the defendant liable for the death of the cattle.

Shields vs. Orr Ditch Co., 23 Nev. 349, was an action to recover damages caused to plaintiff's land and crops by water escaping from defendant's ditch. Defendant knew of the defects in its ditch, and could have corrected them, but failed to do so. It was claimed that plaintiff was guilty of contributory negligence, apparently because he had not constructed on his own land a ditch to carry off the waste water which was doing the injury. The Court very properly held that the doctrine of contributory negligence was not applicable. No duty rested on plaintiff to take care of defendant's water. He had not contributed in any manner to the injury; he had not by any affirmative act brought his land and crops into contact with the defendant's water.

In the present case defendant's negligence brought the cyanide into the road, and plaintiff's negligence brought the sheep to the cyanide; plaintiff actually contributed to its own injury.

The doctrine announced in section 99 of *Sherman & Redfield on Negligence*, and also in *Inland & Seaboard Coasting Co. vs. Tolson*, 139 U. S. 551, 558, does not apply, because there is no evidence that after [26] discovering plaintiff had driven, or was about to drive, his sheep to the cyanide water, defendant could have prevented them from drinking.

There is nothing in the evidence indicating that plaintiff was mislead or thrown off his guard by any acts or omissions on the part of the defendant.

Let a judgment be entered in favor of defendant

for its costs and disbursements.

[Indorsed]: No. 1755. In the District Court of the United States, in and for the District of Nevada. Sierra Land and Livestock Company, a Corporation, Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant. Opinion. Filed January 23d, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [27]

**[Order Granting Plaintiff 25 Days to Take Steps
Relative to Writ of Error.]**

Minutes of Court, February 13th, 1915.

No. 1755.

SIERRA LAND & LIVESTOCK CO.

vs.

PACIFIC POWER & MILL CO.

Pursuant to stipulation filed herein this day, it is ordered that plaintiff have 25 days from the filing of the cost bill within which to take such steps as advised relating to a Writ of Error.

**[Order Allowing Plaintiff to March 28, 1915, to
Prepare Bill of Exceptions, etc.]**

*In the District Court of the United States, in and for
the District of Nevada.*

SIERRA LAND & LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER & MILL COMPANY, a Corpora-
tion,

Defendant.

On application of Summerfield & Richards, attor-
neys for the plaintiff in the above-entitled action,
and good cause appearing therefor, it is hereby
ordered that the plaintiff have 30 days from the 26th
day of February, 1915, within which to take such
action as it may be advised toward an appeal from,
or a review of, the judgment made therein by the
above-entitled court and to prepare any and all bills
of exception and statement upon appeal or review
therein.

Dated, February 24th, 1915.

E. S. FARRINGTON,

Judge.

[Indorsed]: No. 1755. In the District Court of
the United States, in and for the District of Nevada,
Ninth Circuit. Sierra Land & Livestock Company,
a Corporation, Plaintiff, vs. Desert Power & Mill

Company, a Corporation, Defendant. Order. Filed
February 24th, 1915. T. J. Edwards, Clerk.

*In the District Court of the United States, in and
for the District of Nevada, Ninth Circuit.*

SIERRA LAND & LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER & MILL COMPANY, a Corpora-
tion,

Defendant.

**Stipulation [Allowing Plaintiff to March 28, 1915,
to Appeal from Judgment].**

It is hereby stipulated, by and between counsel for
plaintiff and defendant, that plaintiff shall have
thirty (30) days from the date hereof within which
to take such action to appeal from the judgment
made and entered herein by the above-entitled
court.

SUMMERFIELD & RICHARDS,

Attorneys for Plaintiff.

HUGH H. BROWN,

J. H. EVANS,

Attorneys for Defendant.

Dated, February 26, 1915. [28]

[Indorsed]: No. 1755. In the District Court of
the United States, in and for the District of Nevada,
Ninth Circuit. Sierra Land & Livestock Company,
a Corporation, Plaintiff, vs. Desert Power & Mill

Company, a Corporation, Defendant. Stipulation.
Filed February 27th, 1915. T. J. Edwards, Clerk.

*In the District Court of the United States for the
District of Nevada.*

SIERRA LAND & LIVESTOCK COMPANY,
Plaintiff,

vs.

DESERT POWER & MILL COMPANY,
Defendant.

**Order Extending Time [to April 24, 1915, to Prepare
Papers on Writ of Error].**

Good cause appearing therefor, it is ordered that the plaintiff have thirty days additional time from and after this date within which to prepare the necessary petition, assignment or error, writ of error and requisite papers on writ of error, to the United States Circuit Court of Appeals, and to prepare the requisite transcript of the testimony by the stenographer of this Court.

E. S. FARRINGTON,
U. S. District Judge.

Dated March 25th, 1915.

[Indorsed]: No. 1755. In the District Court of the United States for the District of Nevada. Sierra Land & Livestock Company, Plaintiff, vs. Desert Power & Mill Company, Defendant. Order Extending Time. Filed this 25th day of March, A. D. 1915. T. J. Edwards, Clerk. H. D. Edwards, Deputy. Sweeney & Morehouse, Attorneys for Plaintiff.

*In the District Court of the United States, in and
for the District of Nevada.*

SIERRA LAND AND LIVESTOCK COMPANY,
Plaintiff,

vs.

DESERT POWER AND MILL COMPANY,
Defendant.

**Order Extending Time [to May 15, 1915, to Prepare
Papers on Writ of Error].**

Good cause appearing therefor, it is ordered that the plaintiff have twenty (20) days additional time, from and after the 25th day of April, 1915, within which to prepare the necessary petition, assignments of error, writ of error and requisite papers on writ of error to the United States Circuit Court of Appeals, and to prepare the requisite transcript of the testimony by the stenographer of this Court.

E. S. FARRINGTON,

District Judge.

[Indorsed]: No. 1755. U. S. Dist. Court, Dist. Nevada. Sierra L. & L. S. Co., vs. Desert Power & Mill Co. Order Extending Time to Perfect Assignment of Error, etc. Filed April 16th, 1915. T. J. Edwards, Clerk. [29]

**[Order Allowing Plaintiff Five Days Further Time
to Perfect Writ of Error.]**

Minutes of Court, May 14th, 1915.

No. 1755.

SIERRA LAND & L. S. CO.,

vs.

DESERT POWER & M. CO.

Upon application of counsel, good cause appearing therefor, it is ordered that the plaintiff have five days further time within which to perfect, or file its petition, etc., on writ of error. [30]

*In the District Court of the United States in and for
the District of Nevada.*

SIERRA LAND AND LIVESTOCK COMPANY,
Appellant,

vs.

DESERT MILL AND POWER COMPANY,
Respondent.

**Order [Extending Appellant's Time Five Days to
Perfect Appeal].**

Good cause appearing, the time within which the appellants are entitled to perfect their Record on Appeal, and to do all things necessary in the perfection of said Appeal, to the United States Circuit

Court of Appeals, is hereby extended for the period of five days. ,

E. S. FARRINGTON,
United States District Judge.

Dated: May 25th, 1915.

This order is made on the theory that the time heretofore given has not expired.

[Indorsed]: No. 1755. In the District Court of the United States in and for the District of Nevada. Sierra Land and Livestock Co., Appellant, vs. Desert Mill and Power Co. Order. Filed this 25th day of May, A. D. 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Sweeney & Morehouse, Attorneys for Appellant. [31]

*In the District Court of the United States in and for
the District of Nevada.*

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

Petition for Writ of Error.

To the Honorable, E. S. FARRINGTON, Judge of
Said District Court:

The plaintiff, Sierra Land and Livestock Com-
pany, by its attorneys, Sweeney & Morehouse, re-
spectfully shows: That heretofore, on to wit, the —

day of ———, 1915, by the written opinion of the Court, upon the trial of the aforesaid action, before the Court, without a jury, a jury trial being expressly waived by the parties hereto, gave and caused to be entered its judgment, in favor of said defendant and against said plaintiff, on the 23d day of January, 1915, and which said final judgment, was given, made and entered on the 23d day of January, 1915, in said court, against your petitioner.

And your petitioner feeling aggrieved by the said judgment, so entered as aforesaid, hereunto petitions the said District Court of the United States, for the District of Nevada, for an order allowing it, to prosecute a Writ of Error, to the *Circuit of Appeals* of the United States, for the Ninth Circuit, sitting in San Francisco, State of California, under the laws of the United States, in such case made and provided:

Wherefore, your petitioner prays, that a Writ of Error do issue and that an appeal in this behalf to the *United Circuit Court of Appeals* aforesaid, sitting in San Francisco, in said Circuit Court, for the correction of errors, complained of and herewith assigned to be allowed and that an order to be made fixing an amount of security be given by the plaintiff, conditioned as the law directs. [32]

SWEENEY & MOREHOUSE,

Attorneys for Plaintiff.

[Indorsed]: No. 1755. In the District Court of the United States, in and for the District of Nevada. Sierra Land and Livestock Company, a Corporation,

Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant. Petition for Writ of Error. Filed May 17th, 1915. T. J. Edwards, Clerk. [33]

*In the District Court of the United States in and for
the District of Nevada.*

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Corporation,

Defendant.

**Order Allowing Writ of Error and Fixing the
Amount of Bond.**

Upon motion of Messrs. Sweeney & Morehouse, Attorneys for the above-named plaintiff, and upon filing a petition of Writ of Error and Assignment of Error;

It is ordered that a Writ of Error be, and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the Judgment heretofore entered herein, and that the amount of bond on said Writ of Error be, and the same is hereby fixed at \$1400.00 (Fourteen Hundred Dollars) said bond to serve as a cost bond on said Writ of Error and also as a supercedeas and that the clerk of the United States District Court of Nevada, is hereby authorized to approve said bond.

Dated this 13 day of May, 1915.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Indorsed]: No. 1755. In the District Court of the United States, in and for the District of Nevada. Sierra Land and Livestock Company, a Corporation, Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant. Order Allowing Writ of Error and Fixing the Amount of Bond. Filed May 17th, 1915. T. J. Edwards, Clerk. [34]

*In the District Court of the United States, in and for
the District of Nevada.*

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

Bond on Writ of Error.

Know All Men by These Presents: That the Sierra Land and Livestock Company, a corporation, as Principal, and W. T. Holcomb and R. M. Preston, of Reno, County of Washoe, State of Nevada, as sureties, are held and firmly bound unto the Desert Power and Mill Company, a corporation, defendant, in said above-entitled action in the full amount of \$1400.00 (Fourteen Hundred Dollars), lawful money

of the United States, to be paid to said defendant, its successors or assigns, to which payment well and truly to be made, we bind ourselves, executors, administrators or assigns, jointly and severally by these presents. Signed and dated this 1st day of May, 1915.

The condition of the above obligation is that whereas, at a regular term of the United States District Court for the District of Nevada, sitting at Carson City, in said district, in an action at law pending in said court, as herein above-entitled, Case Number 1755, on the law docket of said court, final judgment was rendered and entered against said plaintiff, and in favor of said defendant, upon the opinion of the Judge of said court in favor of said defendant and

Whereas, said plaintiff has obtained a Writ of Error and filed a copy thereof in the clerk's office of said court, to reverse the said judgment of the said court in the aforesaid action, and a citation directed to the said defendant in error, citing it to appear before the United States District Circuit Court of Appeals for the Ninth Circuit to be holden at the City and County of San Francisco, in the State of California, according to law, within thirty (30) days from the date hereof.

Now, the above obligation is such, that if said plaintiff shall prosecute its Writ of Error to effect and answer all damages and costs if they [35] fail to make good their plea and satisfy the action, of said Judge, then this obligation to be void, else to remain in full force and virtue.

In Witness Whereof, said sureties have hereunto set their hands and seals, this 1st day of May, 1915.

W. T. HOLCOMB.

R. M. PRESTON.

State of Nevada,
County of Washoe,—ss.

W. T. Holcomb and R. M. Preston, sureties, being each severally duly sworn says: That they and each of them are residents and freeholders, in the County of Washoe, State of Nevada and each separately worth the sum of \$1400.00 (Fourteen Hundred) Dollars, over and above all his just debts and liabilities in property which is not exempt from sale of execution.

W. T. HOLCOMB.

R. M. PRESTON.

Subscribed and sworn to by each of the aforesaid parties, before me this 1st day of May, 1915.

[Seal]

LEROY PIKE,

Notary Public in and for Washoe County, State of Nevada.

The foregoing Bond on Writ of Error is hereby approved this 17th day of May, 1915.

T. J. EDWARDS,

Clerk U. S. Dist. Court, Dist. Nevada.

[Indorsed]: No. 1755. In the District Court of the United States, in and for the District of Nevada. Sierra Land and Livestock Company, a Corporation, Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant. Bond on Writ of Error. Filed May 17th, 1915. T. J. Edwards, Clerk. [36]

*In the District Court of the United States, in and for
the District of Nevada.*

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

Assignments of Error.

Now comes the Sierra Land and Livestock Company, a corporation, plaintiff above named and in connection with their petition for Writ of Error in this cause makes and files the following Assignment of Error, upon which they will rely, upon the prosecution of their Writ of Error in the above-entitled cause and upon which they rely to reverse the judgment herein as appears of record.

I. That the Court erred in giving and entering judgment for the defendant herein.

II. That said judgment is against law in this, to wit, that it appears from the evidence in this case, that the defendant was guilty of gross negligence and that the defense of contributory negligence could not be issued, pleaded or passed upon as a defense to this action.

III. That in the Federal Courts, contributory negligence is an affirmative defense and must be established by the defendant by preponderance of

evidence and that it appears from the testimony in this case that the defense of contributory negligence was not established, either as a question of fact or of law.

IV. That the testimony of the witnesses, McGarry and of Peter Lamont is positive and that the testimony offered to rebut the testimony of said McGarry and said Lamont is of a negative character and shows no want of diligence, attention, knowledge or care on the part of the said McGarry and said Lamont in the watering of the sheep.

V. That it appears from the testimony, that the said defendant permitted without notice or information to the said plaintiff or to the traveling public, that the waters drank by the plaintiff's sheep was [37] poisoned and that said defendant wilfully permitted said poisoned waters to run down to and over the way traveled by the public, with the knowledge and consent of said defendant, so that said defendant knew that if any person or animal should drink said waters, that they would be poisoned and negligently, carelessly, purposely and willfully permitted said poisoned waters to exist with reckless disregard of the rights of persons or animals.

VI. That the lands of said defendant were open and uninclosed and that for more than two years, animals and people traversed and crossed the said lands at the point and place where plaintiff's sheep were permitted to cross said lands; that said defendant then and there permitted said poisoned waters to be upon said lands and premises with full knowl-

edge that they were poisoned and with full knowledge that animals and persons drinking the same would die.

VII. That it appears from the record without contradiction that said defendant was guilty of gross and wilful negligence so that contributory negligence would constitute no defense to their said conduct.

VIII. That it clearly appears from the evidence that said plaintiff was not guilty of contributory negligence and had no knowledge that the said waters were poisoned, but on the contrary that the same was rain water and they were not informed by said defendant, or any other person that the said waters were poisoned waters.

IX. That the Court erred in finding for the defendant on the ground of contributory negligence and inadvertently overlooked the fact that contributory negligence had to be ascertained by a preponderance of evidence, while it clearly appear from the evidence that the preponderance was with the plaintiff and that the Court inadvertently overlooked the law; that to a willful and gross negligence on the part of the plaintiff, contributory negligence would constitute no defense.

Wherefore, the plaintiff herein prays that the judgment be reversed. [38]

Dated this 8th day of May, 1915.

SWEENEY & MOREHOUSE,
Attorneys for Plaintiff in Error.

[Indorsed]: No. 1755. In the District Court of the United States, in and for the District of Nevada. Sierra Land and Livestock Company, a Corporation, Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant. Assignment of Error. Filed May 17th, 1915. T. J. Edwards, Clerk. [39]

*In the District Court of the United States, in and for
the District of Nevada.*

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

Praeceptum [for Transcript of Record].

To the Clerk of the Above-entitled Court:

Please prepare transcript in the above-entitled case, for the United States Circuit Court of Appeals as follows:

(1) Original Complaint, or if an amended complaint was filed, then instead of original complaint, amended complaint. (2) Demurrer if any. (3) Order sustaining or overruling demurrer, if any. (4) Answer. (5) Agreement filed with Court or minute of Court, waiving jury. (6) Minutes of trial of cause. (7) Opinion of Court after submission of cause. (8) Petition for Writ of Error. (9) Assignments on Writ of Error. (10) Order allowing Writ of Error. (11) Bond on Writ of Error. (12) Writ

of Error. (13) Citation on Writ of Error. (14) Orders enlarging time. (15) Plaintiff's reply to answer, if any. (16) Testimony given at the hearing, certified to by the shorthand reporter. (17) Certificate of Clerk of the United States District Court to Transcript of Record. Yours very truly,

SWEENEY & MOREHOUSE,
Attorneys for Petitioner.

[Indorsed]: No. 1755. U. S. District Court, District of Nevada. Sierra Land and Livestock Co., a Corporation, vs. Desert Power and Mill Company, a Corporation. Praeceptum. Filed May 29th, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy.
[40]

**[Stipulation that Testimony may be Certified by
Special Reporter and Made a Part of this Record.]**

*In the District Court of the United States, in and for
the District of Nevada.*

SIERRA LAND AND LIVESTOCK CO.,
Plaintiff,

vs.

DESERT MILL AND POWER CO.,
Defendant.

It is hereby stipulated and agreed by and between the petitioner for Writ of Error herein and defendant in said Writ of Error; that the whole testimony given at the trial of this cause in the above-entitled Court, may be certified to, by the special reporter

appointed to take the same and made a part of this record on this Writ of Error of the United States Circuit Court of Appeals by the clerk of the above-entitled court.

HUGH H. BROWN,

J. H. EVANS,

Attys. for Defendant.

SWEENEY & MOREHOUSE,

Attys. for Petitioner.

[Indorsed]: No. 1755. U. S. Dist. Court, Dist. of Nevada. Sierra Land & Livestock Co., vs. Desert Power & Mill Co. Stipulation Re Record on Writ of Error. Filed June 12th, 1915. T. J. Edwards, Clerk. [41]

*In the District Court of the United States, in and for
the District of Nevada.*

SIERRA LAND AND LIVESTOCK COMPANY,
Appellant,

vs.

DESERT MILL AND POWER CO.,
Respondent.

**Stipulation [that Clerk of U. S. District Court may
Make Record and Cause Same to be Filed, etc.].**

It is hereby stipulated and agreed, that the clerk of the United States District Court, for the District of Nevada, may make and cause to be filed, the record in the above-entitled cause, notwithstanding that the same, has not been prepared, and filed within the time fixed, by the Writ of Error, and Citation herein,

and that the said record, may be used, heard and passed upon, by the United States Circuit Court of Appeals, subject to such objections, exceptions and questions of law and practice, only as could be raised upon such record, had the same been filed in time.

SWEENEY & MOREHOUSE,

Attys. for Appellant.

HUGH H. BROWN & J. H. EVANS,

Attorneys for Defendant.

[Indorsed]: No. 1755. In the District Court of the United States in and for the District of Nevada. Sierra Land and Livestock Company, Appellant, versus Desert Mill and Power Company, Respondent. Stipulation. Filed June 18th, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Morehouse and Sweeney, Attorneys for Appellant. [42]

[Certificate of Clerk U. S. District Court to Copy of Record and Proceedings on Return to Writ of Error, etc.]

In the District Court of the United States for the District of Nevada.

No. 1755.

SIERRA LAND AND LIVESTOCK COMPANY, a Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Corporation,

Defendant.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing forty-two (42) typewritten pages, numbered from 1 to 42 inclusive, to be a full, true and correct copy of the record and of all proceedings in said cause and court, and that the same, together with the original Citation and Writ of Error, hereto annexed, constitute the return to the Writ of Error.

I do hereby certify that the cost of the foregoing record is \$35.10, and that the same has been paid by the plaintiff herein.

I further certify that the testimony in said cause, certified by the reporter, and annexed hereto in accordance with the stipulation found on page 41, has not been filed in my office, and the same is, therefore, not certified as being a part of this return.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Carson City, Nevada, this 28th day of June, 1915.

[Seal]

T. J. EDWARDS,

Clerk.

[Ten Cents Internal Revenue Stamp. Canceled
6/28/15. H. D. E.] [43]

*In the District Court of the United States, in and for
the District of Nevada.*

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

Writ of Error [Original].

United States of America,—ss.

The President of the United States to the Honorable
E. S. FARRINGTON, Judge of the District
Court of the United States for the District of
Nevada, GREETING:

Because, in the record and proceedings, as also in
the rendition of the judgment, which is in the said
District Court, before you, between the Sierra Land
and Livestock Company, a corporation, plaintiff, vs.
Desert Power and Mill Company, a corporation, de-
fendant, a manifest error has happened to the great
damage of the said plaintiff, as by said complaint ap-
pears, and we being willing that error, if any hath
been, should be duly corrected and full and speedy
justice done to the parties aforesaid in this behalf, do
command you, if judgment be therein given, that
under your seal, distinctly and openly you send the
record and proceedings, with all things concerning
the same, to the United States Circuit Court of Ap-

peals for the Ninth Circuit, together with this Writ, so that you have the same, at the City and County of San Francisco, in the State of California, on the — day of —, 1915, [44] in the Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the Circuit Court of Appeals, may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WM. W. MORROW, Judge of the United States Circuit Court of Appeals, Ninth Circuit, the 17th day of May, 1915.

[Seal] T. J. EDWARDS,
Clerk of the United States District Court, for the District of Nevada.

Service by copy of Writ of Error as issued in the above-entitled Court and cause accepted this 28th day of May, 1915.

HUGH H. BROWN,
J. H. EVANS,

Attorneys for Defendant. [45]

[Endorsed]: No. 1755. In the District Court of the United States, in and for the District of Nevada. Sierra Land and Livestock Company, a Corporation, Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant. Writ of Error. Filed June 2, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [46]

*In the District Court of the United States, in and for
the District of Nevada.*

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

Citation on Writ of Error [Original].

The President of the United States of America, to
Desert Power and Mill Company, a Corporation,
and Mr. Hugh H. Brown and J. H. Evans, At-
torneys for Defendant, Greeting:

You and each of you are hereby cited and admon-
ished to be and appear, in the Circuit Court of Ap-
peals for the Ninth Circuit, at the City and County
of San Francisco, State of California, within (30)
thirty days from and after the date which this cita-
tion bears, pursuant to a Writ of Error filed in the of-
fice of the Clerk of the District Court of the United
States, for the District of Nevada, in the above-en-
titled cause, wherein said plaintiff, is plaintiff in
error, and the said Desert Power and Mill Company,
a corporation, as defendant in error to show cause if
any you have, why the judgment made and entered in
said cause on the 23d day of January, 1915, against
said plaintiff and in favor of said defendant, should
not be corrected and reversed as prayed in the peti-
tion herein and set forth in the writ of error herein,

and why justice should not be done to the parties in that behalf. [47]

WITNESS the Honorable E. S. FARRINGTON, Judge of the United States District Court, for the District of Nevada, this 17th day of May, 1915.

E. S. FARRINGTON,

Judge. .

[Seal]

Attest: T. J. EDWARDS,

Clerk of the United States District Court, for the District of Nevada.

Service by copy of Citation on Writ of Error as issued in the above-entitled Court and cause accepted this 28th day of May, 1915.

HUGH H. BROWN,

J. H. EVANS,

Attorneys for Defendant. [48]

[Endorsed]: No. 1755. In the District Court of the United States, in and for the District of Nevada. Sierra Land and Livestock Company, a Corporation, Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant. Citation on Writ of Error. Filed June 2d, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [49]

**IN THE
DISTRICT COURT OF THE UNITED STATES, IN
AND FOR THE DISTRICT OF NEVADA.**

**SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,**

Plaintiff,

vs.

**DESERT POWER AND MILL COMPANY, a Cor-
poration,**

Defendant.

TRANSCRIPT OF TESTIMONY.

**Mr. J. A. SANDERS, SUMMERFIELD & RICH-
ARDS, for Plaintiff.**

**Mr. HUGH H. BROWN, Mr. J. H. EVANS, for
Defendant.**

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[Transcript of Testimony and Proceedings.]

*In the District Court of the United States, in and for
the District of Nevada.*

No. 1755.

SIERRA LAND AND LIVESTOCK COMPANY, a
Corporation,

Plaintiff,

vs.

DESERT POWER AND MILL COMPANY, a Cor-
poration,

Defendant.

BE IT REMEMBERED that this case came on regularly for trial in the above-entitled court on Monday, the 16th day of November, 1914, at 10 o'clock A. M., before the Honorable E. S. FARRINGTON, Judge of said Court, without a jury, a jury having been waived to try said case.

Mr. J. A. SANDERS and SUMMERFIELD & RICHARDS appearing as Attorneys for Plaintiff; and Mr. HUGH H. BROWN and Mr. J. H. EVANS, appearing as Attorneys for Defendant.

Whereupon the following proceedings were had and testimony introduced:

After the reading of the pleadings, upon request of counsel for plaintiff, all the witnesses were called, and instructed by the Court; Mr. W. T. Holcomb and Mr. Carl S. Wheeler, as officers of plaintiff, and Mr. Frederick F. Heydenfelt, as the representative of

defendant, being exempt from the rule, by agreement of counsel. [1*]

[3] [Testimony of W. J. Moran, for Plaintiff.]

Mr. W. J. MORAN, called as a witness on behalf of plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. SUMMERFIELD.

Q. What is your name? A. W. J. Moran.

Q. Where do you live, Mr. Moran?

A. In Tonopah.

Q. Tonopah, Nevada? A. Tonopah, Nevada.

Q. How long have you lived there?

A. I have lived there since 1905.

Q. What is your profession, business, or occupation? A. Civil and mining engineer.

Q. How long have you been engaged in that profession? A. About thirteen years.

Q. In what general nature?

A. Oh, surveying—mine surveying and land surveying.

Q. And where?

A. Throughout different parts of Nevada, principally.

Q. What has been your training, education, or experience in that business?

A. I have been continuously engaged, well, for the past thirteen years.

Q. What, if any, special training or education did you have in that business?

A. Oh, I completed a course in mining engineering in the State University of Nevada.

*Original page-number appearing at top of page of original type-written Transcript of Testimony.

(Testimony of W. J. Moran.)

Q. Are you acquainted with Mr. J. A. Sanders?

A. Yes, sir.

Q. Do you know where Millers is in this State?

A. Yes, sir.

Q. Where is it approximately from Tonopah?

A. About thirteen miles, I believe it is considered.

Q. Were you called upon by Mr. Sanders—this is rather leading—or by any one else, for the Sierra Land and Livestock Company to [3] make any surveys, about the month of January or February, one year ago?

A. Yes, sir, I was requested by Mr. Sanders to make a survey.

Q. Did you make such survey? A. Yes, sir.

Q. When?

A. It was on the 14th and 15th of February of this year.

Q. Of last year? A. This year.

Q. How long were you occupied in making that survey? A. I think it was practically two days.

Q. Did you take any field-notes of your survey?

A. Yes, sir.

Q. Who designated the locality to you?

A. I visited the ground with Judge Sanders several days previous to that.

Mr. SANDERS.—I didn't catch that last answer.

WITNESS.—I said I visited the ground with Judge Sanders several days previous to making the survey.

Mr. SUMMERFIELD.—(Q.) When did you first see the ground with Mr. Sanders?

(Testimony of W. J. Moran.)

A. That was on the 10th of February.

Q. Well, when did you make the actual survey?

A. That was on the 14th and 15th of February.

Q. Who, if any one, assisted you in making that survey?

A. Mr. McCarthy—William McCarthy.

Q. Now, when you first went there with Judge Sanders, just state to the Court in general what was pointed out to you with reference to land, or contiguities of land, or any matter of that kind, similar in character, that you were expected to take into consideration in making your survey.

A. Why, Mr. Sanders pointed out the ground on which the sheep died and the pools from which they drank, and the dam—the tailings [3½] dam—close to the mill, and the pump-house, and other small improvements around there—the roads; and he told me to locate all those things, and show them with reference to each other.

Q. Well, were they pointed out to you specifically?

A. Yes, sir, the different pools were pointed out; the road in which the water stood from which the sheep drank; the tailings dam, the breaks in the dam, and the ditches from which the water flowed down on to the flat.

Q. And was the pump-house indicated to you?

A. The pump-house and the enclosure, and other small buildings in that neighborhood.

Q. At that time at the place that was pointed out to you, did you or did you not observe any sheep tracks, or tracks of any kind or character?

(Testimony of W. J. Moran.)

A. Yes, sir.

Q. And to what extent, Mr. Moran?

A. Well, the most of the tracks were along the road and east of the road, that is, towards Tonopah; and there was a few tracks—

Q. (Intg.) What side would you call that by the points of the compass, when you say “towards Tonopah”? A. Well, that is on the east side.

Q. Now, which road?

A. Well, that is the road that runs through close to the pump-station, running north; it runs through the yard at Millers, that is, the middle yard.

Q. Now, as the result of the survey that you made about five days later—is that the way I understood it, commencing about five days later, after that time?

A. Yes, sir.

Q. Have you or have you not prepared a map embodying the results of your surveys? A. Yes, sir.

Q. Have you that map here? (The map is produced.)

Q. What is that document you hold in your hand at the present [4] time?

A. This is the map that I prepared from my field-notes.

Q. Has that been in your possession since the time that you made it? A. Yes, sir.

Q. How, Mr. Moran, does that map correspond with the result of your field-notes and your survey that you made?

A. Why, that shows all the different improve-

(Testimony of W. J. Moran.)

ments in that neighborhood accurately; it was prepared from the field-notes.

Q. Have you the field-notes with you at the present time? A. Yes, sir.

Mr. SUMMERFIELD.—At the present time, if your Honor please, I will offer this map in evidence. I have handed counsel a blue-print copy of this map.

Mr. BROWN.—If the Court please, there is indicated on the map what purports to be a public highway; we object to the map in so far as it purports to establish a public highway, on the ground that our statute defines a public highway.

The COURT.—Excuse me for interrupting you, but I suppose the map can go in with the understanding that this is a contested question as to whether that is a public highway or not.

Mr. SUMMERFIELD.—That is correct, if your Honor please; but of counsel will look, he will not find public highway; it reads “wagon-road.”

Mr. EVANS.—There is one which reads “old wagon-road.”

Mr. SUMMERFIELD.—It reads “wagon-road,” but I would have no objection to its being considered, if it is a contested matter—anything of that kind on the map that would involve a conclusion of law will be deducible from the proof.

Mr. BROWN.—Subject to that reservation.

The COURT.—Very well, it will be admitted.

[5] (The map is placed on the board, and marked Plaintiff's Exhibit “A.”)

(Testimony of W. J. Moran.)

Mr. SUMMERFIELD.—(Q.) Mr. Moran, taking this pointer, and referring to the map which you have already designated as being the result of your survey, will you indicate on the map by reference to your field-notes, if you have them, how you commenced your survey, what points you surveyed, what courses you got, what levels you took, and where the physical characteristics designated were, as shown by your notes?

A. I commenced the survey at this point marked "1" on the map, close to the forks of the roads; now from there I ran a line up to this point, indicated as "2," close to the corner of the dam; then I believe I ran back to this point "3"—at any rate, I ran all these lines.

Q. Well, can you tell definitely by reference to your notes?

A. I believe I can. (Witness produces book.) The first line was run from the point indicated as "1" to the point indicated "2"; thence to "3," thence from "3"—

Q. How far was it from point 1 to point 2?

A. I will have to add up that course.

The COURT.—Can you write those distances later on the map?

Mr. SUMMERFIELD.—I think so. You can proceed with that and make the calculations later.

The COURT.—Is the map drawn to a scale?

WITNESS.—A hundred feet is the scale. I can get those distances accurately. Thence I ran from

(Testimony of W. J. Moran.)

"2" to the point "3"; thence from "3" to the point "4"; from "4" to point "5"; then I came back to point "2," and I ran from point "2" to point "6"; then from point "6" to point "7"; thence up to the mill; then I returned to point "3," ran from point "3" to point "8," and from [6] point "8" to point "9," and from point "9" to point "10"; and I located, for instance at point "2," I located these different angles in the dam—another here (indicating); and also took sight shots or bearings from point "8" to point "9," and "10" also. At this point here—

Mr. SUMMERFIELD.—(Q.) What is the point?

A. That is point "5"; I believe I located the forks of these roads at point "5"; I located the forks of the road here from point "1," and thence I ran a line from point "1" out here, out north, in order to get this road; and I took offsets through here to get the outline of this dry lake; I ran this line through here; and I also located these pools indicated in blue, from this point marked "1."

Q. While you are upon that point, what does that portion of the map colored blue signify or indicate, as a result of what you observed at the time you surveyed?

A. This blue color indicates standing water at the time I made the survey.

Q. Now, what does that brown color indicate?

A. That indicates fresh mud.

Q. And what does the yellow indicate, as you ascertained by your survey?

(Testimony of W. J. Moran.)

A. This yellow indicates the Dry Lake; these two lines or boundaries marked "Edge of Dry Lake," indicate the boundaries of the Dry Lake.

Q. What do the two parallel black lines indicate?

A. That indicates wagon-roads.

Q. What does the line of asterisks or crosses indicate? A. That indicates a fence.

Q. There is one other portion, extending in a crescent form, as indicated upon the map; what is that?

[7] A. Well, the outlines of the tailings dam; there are other dams in the interior here, but this is the outside dam.

Q. I notice from what you have designated as the outer dam, extending in a northwesterly direction, there is marked "watercourse"; is that an outlet or inlet?

A. Those are outlets.

Q. Does that same apply to the others or not?

A. Yes, sir.

Q. That are marked in the same way?

A. Yes, sir.

Q. Did you see what they called the pump-house there? A. Yes, sir.

Q. Indicate where that is upon that map?

A. That is right at this point here (indicating).

The COURT.—Is it marked?

A. Pump-house and—well, it is marked.

Mr. SUMMERFIELD.—(Q.) What are those indications upon this map which you have indicated that are east of the pump-house, and across what you have designated as the wagon-road?

(Testimony of W. J. Moran.)

A. This is, as I understood it, the residence of the man in charge of the pump; and there is a chicken ranch there—this is a chicken-house.

Mr. SUMMERFIELD.—I believe those are all the points, if your Honor please, and we will continue the examination with reference to the located points.

Q. How long have you been familiar with that country there, Mr. Moran?

A. Oh, I have been familiar with it ever since I have been in Tonopah.

Q. Well, how long? A. Ever since 1905.

Q. I wish you would state to the Court what, if anything, you know about that road that you have designated as a wagon-road, and running between the pump-house and the chicken-house, and through the Dry Lake. since you have been in that country?

[8] Mr. BROWN.—One moment. What is the purpose of that question? If the purpose is to show that was a public highway, we object to it.

Mr. SUMMERFIELD.—That is precisely what the purpose is, if your Honor please, to show by this witness, so far as his memory extends, that it has been commonly used as a public highway through that country; and, with other testimony to show it for many years previous to that time also.

(Argument.)

The COURT.—Do you propose to show this highway was created otherwise than by use?

Mr. SUMMERFIELD.—No, by use; but if permitted to do so, to show by use for fifty years—forty

(Testimony of W. J. Moran.)

or fifty years. Is that about what you will show, Mr. Sanders?

Mr. SANDERS.—I don't think we can show that this particular segment of the road has been used for that length of time; but it is a part of a road which has been continuously in use for a number of years, since the discovery of what we call the southern country.

The COURT.—I have allowed you to discuss this matter, gentlemen, because I wanted to hear what you had to say, but I shall follow the course I usually pursue in cases of this kind. Evidently you both have a point to make, and I prefer that the testimony go in, unless it takes too much time, and I don't think it will, and then it can be argued with the whole case later.

Mr. BROWN.—Your Honor will allow us to enter an exception on the grounds and for the reasons stated in the objection.

The COURT.—Certainly. Of course, gentlemen, you understand where the testimony goes in, and your objections are overruled, [9] as they are here, I will expect later, if you expect to make a point on the ruling as error, that my attention will be called to it, so that I can make a ruling, definitely and positively, and with the idea that you want to take advantage of it. I am allowing this testimony to come in now, because I want to hear it all, but I do not wish you to consider one of these rulings as error unless my attention is called to it later. If

(Testimony of W. J. Moran.)

you think I have made an error and wish to take advantage of any of these rulings, I want my attention called particularly to it before the case is concluded.

Mr. SUMMERFIELD. — I understand your Honor's ruling.

(By direction the reporter reads the last question.)

WITNESS.—I believe the first occasion I had to travel through Millers and out in a northerly direction, was about possibly a year and a half ago, and I travelled over that road; that was the main travelled road out of Millers going in that direction; I might have been over it in the last year or so, since that first time a year and a half ago, well, probably three or four times.

Q. Did you have any knowledge otherwise than that you have mentioned, of the existence of that road before the time you have mentioned?

A. I could not say that I had any particular knowledge of it; I knew there were roads leading in that direction out of Millers.

Q. How long ago?

A. Oh, I guess ever since I have been in Tonopah; I could not say exactly, but some years back.

The COURT.—(Q.) You have known that for four years then? A. Yes, I think it is safe to say.

Q. You have been four or five years in Tonopah?

A. Yes, I have been there nine years—since 1905.

[10] Mr. SUMMERFIELD.—(Q.) Do you know, or not, Mr. Moran, what the terminus of that road was? A. That is north of Millers?

Q. Yes.

(Testimony of W. J. Moran.)

A. Why, it runs—there is one road that runs up through Cloverdale, and up in through Reese River; and another road that branches off and runs up to the camp of Liberty; another road runs up and branches off—

Q. (Intg.) I mean that particular road?

A. Another road branches off and runs up through Smoky Valley, up in Millets.

Q. I mean the other direction, on that particular road.

A. All those roads are in a northerly direction, I think this road was what you might call the continuation, the road that runs out through Cloverdale and up through Reese River.

The COURT.—(Q.) In going from Tonopah to Smoky Valley, Liberty and Reese River, do you pass over this particular section of road?

A. This is the main travelled road; there are several other roads, but that is the main road going out through Tonopah and Reese River.

Mr. SUMMERFIELD.—(Q.) If I understand you correctly—I don't want to lead you—these other roads you mention are branch or lateral roads from this one; is that correct?

A. Yes, sir; that is, the roads that lead into Liberty and through Smoky Valley.

Q. Do you know of Crow Springs? A. Yes, sir.

Q. Is that one of those branch roads that you mention?

A. There is a branch road that goes—I have not

(Testimony of W. J. Moran.)

been over that road—I know there is a road that goes through Crow Springs.

Q. What about Sodaville, do you know anything about it? A. With reference to the roads?

[11] Q. Yes.

A. Well, the original road, I believe—stage road—going from Sodaville to Tonopah, went through Crow Springs, thence across the flat north of Millers.

Q. Does that, or not, connect as a lateral with this main road which you have mentioned here?

A. Yes, sir.

Q. Mr. Moran, I wish you would state to the Court, if you can, what is the elevation of the dam, of the impounding works of the defendant company, above Dry Lake.

A. Well, the point indicated as “2,” that is the northeast corner of the tailings dam; that is the point of the tailings dam which is closest to the Dry Lake.

The COURT.—Will you point to it, Mr. Moran, if you please?

A. That is this point here (indicating on map.)

Q. That is point “2”?

A. Point “2” here. This point here is ten feet higher than this point “1” on the Dry Lake.

Mr. SUMMERFIELD.—(Q.) What is this point where I place my finger at the present time—how do you designate that point?

A. I call that the main break in the dam.

Q. What is the elevation of that above the lake?

A. Well, this is—I didn’t get the exact elevation

(Testimony of W. J. Moran.)

of that, but it is practically the same as the point "2."

Q. Was there or was there not water level all the way around?

A. No, not exactly; this over here is a little higher than this here (indicating)—this point over here.

Q. Now, at the time you made your survey from point "2" to the Dry Lake, did you or did you not make any examination of the impounding dam with reference to its condition? A. Yes, sir.

Q. What was its condition?

Mr. BROWN.—As of what date?

[12] Mr. SUMMERFIELD.—At the time that he made his survey. I will change that. (Q.) When you went with Judge Sanders, what was its condition—that was on the 10th of February, was it?

A. That was on the 10th of February.

Q. What was its condition at that date?

Mr. BROWN.—We object to it on the ground it is incompetent, irrelevant and immaterial as to any date involved in this case.

Mr. SUMMERFIELD.—I submit, if your Honor please, that the testimony with reference to physical characteristics, say within five days, is competent testimony.

The COURT.—That was five days after the accident he visited it.

Mr. SUMMERFIELD.—Yes.

Mr. BROWN.—If counsel will properly limit the scope; that is to say, to general physical characteristics and features; the general characteristics of con-

(Testimony of W. J. Moran.)

struction, material and so forth; but as to any particular defects which he might have found existent subsequent to February 5th, we object to that.

The COURT.—Will that be satisfactory?

Mr. SUMMERFIELD.—The question is what he saw of the characteristics as they existed at that time.

The COURT.—I think I will allow that testimony to go in, but, of course, we ought to know the conditions as they existed at the time of the accident.

Mr. SUMMERFIELD.—We will endeavor to show that; we will have witnesses, of course, on that; but I submit that within that time all of what he saw in the nature of physical condition, would be for the Court to deduce from that.

The COURT.—The witness may go on and give his testimony; and if there is anything that is objectionable, it can be stricken [13] out later.

WITNESS.—This point I indicate on the map as the “Main break in the dam”; there is standing water on the outside here; and that had evidently been repaired within a day or two previous to our visit there, and that had been filled in with fresh mud or tailings from the dam.

Mr. SUMMERFIELD.—(Q.) What about point “2”?

Mr. BROWN.—One moment. I move to strike out the answer on the ground heretofore stated in the objection. He found water standing outside there

(Testimony of W. J. Moran.)

on the 10th day of February, it might have been precipitated there on the 8th day of February, three days after the accident, or any other time after the accident.

The COURT.—I think I will allow that to stand subject to the objection.

Mr. BROWN.—We note an exception on the ground stated in the objection.

The COURT.—The testimony is on the main break he found fresh mud, which looked as though it had been placed there recently. Did he give further testimony as to there being a pool of water outside of the dam?

Mr. SUMMERFIELD.—What did you say about that?

WITNESS.—A very thin sheet of water—

The COURT.—(Intg.) Well, I don't think that is material except as it shows there is a place there where water can stand.

Mr. SUMMERFIELD.—I think it has materiality in connection with that testimony, if your Honor please.

The COURT.—Very well.

Mr. SUMMERFIELD.—(Q.) What about point "2"?

A. This is not exactly point "2"; I think you refer to this other break in the dam here.

[14] Q. That is the one I mean.

A. That is this point here (indicating on map).

(Testimony of W. J. Moran.)

Q. What is it marked?

A. That is marked "Break in dam"; that was in practically the same condition.

Mr. BROWN.—(Q.) Is this February 10th?

A. This is February 10th.

Mr. BROWN.—The same objection, if the Court please.

The COURT.—It will be the same ruling.

Mr. BROWN.—The same exception.

WITNESS.—That had evidently been repaired a few days previous.

The COURT.—Just tell what you saw there to indicate that was done.

Mr. SUMMERFIELD.—(Q.) What was it?

A. Well, there was fresh mud or tailings piled in here to repair this break.

Q. What, if anything, did you observe on February 10th with reference to whether there were any creases or crevices in the impounding dam?

A. Well, this was—that is, in reference to any water?

Q. No; was there or was there not any indications of breaks in that dam with reference to washes upon the land itself, or not—the land comprising the dam itself?

A. There were no breaks that I recall outside of these two here.

The COURT.—These two where?

A. This main break, and this point marked "break."

(Testimony of W. J. Moran.)

Mr. SUMMERFIELD.—(Q.) Did you notice any wash channels on the dam?

A. Right on the dam itself?

[15] Q. Yes, around on the dam, at the lower margin of the dam.

A. Well, I will say this, it had been washed here at this main break, and also here—the “break in dam”; that is not point “2,” point “2” is situated here (indicating on map).

Q. Mark the place on the map with your pencil, so that it can be indicated.

A. This is indicated by an arrow, this “Break in dam.”

The COURT.—Mark it with some number.

WITNESS.—I will mark that “11.”

Mr. SUMMERFIELD.—(Q.) Now, what, if anything, did you observe at that time with reference to whether there was or was not any channel from either the main break or the point you have indicated as number “11,” to what you have indicated by colors as constituting the dry land through which the wagon-road runs?

Mr. BROWN.—Same objection.

The COURT.—I will admit that subject to the objection.

Mr. BROWN.—We note an exception.

WITNESS.—There was a channel, indicated on the map as “Watercourse,” running from the main break down here (indicating); and there is a channel here, indicated as “Watercourse,” running from

(Testimony of W. J. Moran.)

this point indicated "Break in Dam, No. 11" down through here. That continued on down in through, here; this was mud, saturated mud you might say, it is indicated in brown colors, continued on down through here.

Mr. SUMMERFIELD.—Q. State, if you are able so to do, about the size of those channels, approximately.

A. Oh, they are probably a foot or so wide, and approximately a foot deep.

The COURT.—Are they old channels, could you tell?

A. These are the channels here marked "Water-courses"; these are [16] fresh channels.

Mr. SUMMERFIELD.—(Q.) What is the general nature, so far as your observation at that time of that impounding dam, with reference to the material of which it was constructed?

A. Well, it was constructed of material,—tailings taken from this dam and thrown out from the mill.

Q. Were there any fences there?

A. There were some fence posts, evidently fence posts, projecting from this point along here (indicating).

Q. What is the number of that section?

A. That is from point "2" to the point indicated as "Main break in dam." There was also a line of posts up this side of the dam—that is the east side of the dam—from the point indicated as point "2."

Q. How far did those fence posts project above

(Testimony of W. J. Moran.)

the surface of the ground?

A. Well, as I recall it, they are very close to the surface here, probably six inches, or some such matter.

Q. Is this line of asterisks which I now trace with my finger, bordering the crest of the dam, and marked "Fence" upon this map, is that the fence that you refer to? A. Yes, sir.

Q. When you made your survey, commencing on February 10th of the present year—

A. (Intg.) I commenced the survey on the 14th.

Q. Oh, the 14th—was there any difference in the physical characteristics between that time and the time that you first observed and examined them on the 10th day of February?

A. Why, the water had evaporated; the water in these pools along the road here, and in the channels; the channels had dried up some, and in through here there had been quite a little evaporation.

Q. What physical characteristics were there with reference to the road marked "Wagon-road," and running through the Dry Lake, indicated [17] by the yellow color at the two times that you examined them?

A. That is, with reference to the water standing there?

Q. No, with reference to the road itself.

A. I don't recall any difference in the road.

Q. What I have reference to, Mr. Moran, did it indicate that it was being used as a general travelled

(Testimony of W. J. Moran.)

road, or not—were there any wagon marks?

A. Oh, yes; yes, it had been used.

Q. Where that road marked “Wagon-road” on the map passed through what you have designated as the Dry Lake, what was the elevation of the road passing through Dry Lake, compared with the contiguous country?

A. Well, that is practically a level country out in through here—north; this opens out into a dry lake in here, spreads out in this fashion (indicating), and this is level all in through here, a flat country.

Q. Were you up at the impoundment that time—either one of the times?

A. That is in here? (Indicating on map.)

Q. Yes. A. Yes, sir.

Q. When?

A. I was there on the 10th; and I was also there on the 14th and 15th.

Q. Are you acquainted with Mr. Heydenfelt?

A. Yes, sir.

Q. Do you know whether he was the superintendent of the Smelter Company, I mean of the Desert Power and Mill Company?

A. I understood he was the superintendent of the mill.

Q. Did he or did he not so inform you?

A. Yes, sir.

Q. Did you have any conversation with him at either of those times? A. Yes, sir.

Q. What was it?

(Testimony of W. J. Moran.)

A. Well, it was on the 14th; I was at this point "2," had my instrument there, and was making the survey, so he told me he would not permit any further surveying there, he [18] didn't like the idea of anybody surveying on there without any permission from him; so I asked him if he was the superintendent there at the mill, and he said he was.

Q. Was there anything said by him about the escape of cyanide waters?

A. No, sir, I don't believe there was.

Q. You don't remember anything of that?

A. No, sir.

Q. What is the elevation of the part marked in brown upon that map, which, as I understand it, indicates the mud and sediment; what is the elevation of that as compared with the yellow?

A. This is here approximately a foot higher.

Q. When you say "this is here," you mean the brown, don't you?

A. This point here to which I am pointing; this point "3" is about two feet higher than this point "1"; it reduces down to about—this has an elevation of about a foot higher, this point here, where it spreads generally.

The COURT.—(Q.) That is the brown?

A. That is the brown; that has an elevation of about a foot higher than this point "1."

Mr. SUMMERFIELD.—(Q.) Where is the lowest point, if you are able so to state, of that surveyed territory?

(Testimony of W. J. Moran.)

A. Well, that is along this road here; that is level there.

Q. Along the road?

A. This point indicated in blue here, out to this Dry Lake; that is practically level; these pools here are small depressions in the Dry Lake.

Q. That in blue is still lower than the yellow; is that correct? A. Yes, sir.

Q. It is where the water assembles, I suppose?

A. Yes, sir.

Q. How far, Mr. Moran, is it from the pump-house to the place where you saw those sheep tracks?

A. Why, I think the sheep tracks were spread pretty generally in through this territory in through [19] here; I would say about a hundred feet, that is, this nearest water here was about a hundred feet from the pump-house.

The COURT.—(Q.) Well, do you mean the nearest tracks?

A. I could not say just exactly; there were tracks all through here; they were along in here, I know, very close to the edge of the water.

Mr. SUMMERFIELD.—(Q.) That is on the east of that road, when you say “all through here,” is that correct?

A. Yes, sir; along through this territory here, east of the road.

Q. And what did you find with reference to the actual roadway itself, and I mean by that where the wagon tracks are?

(Testimony of W. J. Moran.)

A. Well, there are tracks—that is, with reference to the sheep tracks?

Q. Yes.

A. Well, there were tracks along about in through this neighborhood (indicating).

The COURT.—Can you designate that?

A. Well, that is possibly two hundred and fifty feet from the corner of the fence here.

Mr. SUMMERFIELD.—(Q.) How far from the pump-house?

A. About three hundred and fifty feet, I should say, or four hundred.

Q. And to the north?

A. North, directly north of the pump-house.

Q. What, if anything, did you observe with reference to tracks west of what you have marked as the “wagon-road,” and where it runs through what you have designated as the “Dry Lake” in the yellow color?

A. There are a few tracks at this small pool here; and there were a few right here at the end of this larger pool; it is possible three or four sheep had crossed there, there were only a few tracks in there.

[20] Q. Did you discover any tracks on the west side of what you have marked as the “Wagon-road,” except what you said a few minutes ago?

A. There might have been a few along here, I could not say; but these are the only tracks here to the west that I found by these small pools.

By Mr. SANDERS.—(Q.) What is the condition

(Testimony of W. J. Moran.)

of the surface of that Dry Lake there; was it hard, soft, pliable, or what?

A. Well, it was hard after you get off of this road here, it was hard in through here.

Q. Now, as you approach the point you have designated "1," what was the condition of the roadbed as to being—as to the roadbed itself?

A. The road that ran off in that direction?

Q. The condition of the roadbed as it approached point "1."

A. Why, it was standing water in here, that is indicated in blue.

Q. Was it in the ruts, or was it in the middle of the road?

A. This was standing generally in here; it covered the road; in through this section here, it was principally in the ruts of the road.

Q. Now, how was it as to this part of the road about the pump-house, and along there; was there any water in that? A. There was no water in this.

Q. What was the condition of that road as to being smooth or cut up?

A. No, this is what they would call a good wagon-road.

Q. How did you go down there, how did you travel?

A. Why, I travelled this road here (indicating).

Q. By what means of conveyance?

A. In an automobile.

Q. At this point here (indicating), what was the

(Testimony of W. J. Moran.)

condition of the road as to being travelled or used?

A. Well, this road here had been used some; it evidently was not [21] used as much as this road; this was a sort of a cut-off, I think, going off into that country.

Q. Do you know where the postoffice in Millers is, the building?

A. Why, it is within a hundred or two feet, it seems to me; it is approximately three hundred feet, that is, on this side of the railroad track; the track went through here, and a couple of hundred feet from the track, about three hundred feet in an easterly direction, and about two hundred feet northerly of the track.

Q. Now, what was the connection between this road and the postoffice, as far as you were able to observe on the 10th?

A. Why, it was in usual good shape.

Q. Was it a direct route from the postoffice over to this point here that you travelled to get to this pump-house? A. Yes, sir.

Q. You speak of that as a pump-house; are you familiar with what it is used for and what it is supposed to be there for? A. Yes, sir.

Q. What is it?

A. Why, I am in a way; I understand it was used for the purpose of supplying Millers with domestic water.

Q. Was anyone in charge of that pump-house on the 10th?

A. There was a man there who I understood was

(Testimony of W. J. Moran.)

in charge of it; a man also lived here.

Q. Did you have any conversation with him on that day?

A. Why, I had a short conversation with him.

Q. Can you give us what was said in that conversation?

A. Why, I was about this point here, in between these roads, I think I had just commenced to survey; he came out and commenced the conversation; I didn't ask him a question; he said this was rain-water standing here.

[22] Mr. BROWN.—If your Honor please, I could not anticipate what the nature of this conversation was, and I move to strike it out on the ground it is incompetent, irrelevant and immaterial, not going to any issue in the case.

The COURT.—It seems to me so.

Mr. SANDERS.—The purpose of the inquiry to my mind is obvious: The fact of the physical condition, whether or not it was possible for this water to escape from the pump-house, if there was any collection of water around the pump-house that it might have escaped, and gotten over to the point where these sheep tracks were. In other words, I don't want the Court to get any idea or conception from our standpoint but what this water came from this settling pond over here, and took the course of these channels described on the map. There might be confusion in the mind of the Court that this water, being only a hundred feet from the pump-

(Testimony of W. J. Moran.)

house supplying Millers with water, that there might have been a collection of water in there that might have gotten over to this point; now the statement of the pump-house man that it was rain-water would show it was not connected with any overflow or escape of this pump-house water. That was the reason I wanted to bring that out.

Mr. BROWN.—There is no solid ground thereto; suppose that the water came from the pump-house; and there are no conditions presented here warranting the Court in drawing a conclusion that the water came from the pump-house. There is not the shadow of suggestion here that there has been any surface discharge of water from the pump-house. The explanation, reason and motive for the question is specious, and not pertaining to the situation whatever, and the question is grossly immaterial. During the rainy season [23] water might have come there any of the five days subsequent to February 5th; there might have been rain-water there on the 10th, and might not have been rain-water there on the 5th.

The COURT.—I do not see the materiality of it. Of course, the only condition I can consider, it seems to me, is the condition that existed at the time this accident occurred; and the testimony as to conditions on the 10th and 14th is only relevant, as tending to show the probable condition on the 5th.

Mr. SANDERS.—That is exactly the point.

The COURT.—This testimony is that that was

(Testimony of W. J. Moran.)

rain-water on the 14th, was it, or on the 10th?

Mr. SANDERS.—On the 14th.

The COURT.—So far I cannot consider that was rain-water on the 5th very well, unless there is evidence that there was an enormous quantity of it, and it could not possibly have evaporated, and that there was no rain in the meantime.

Mr. SANDERS.—I am going to follow that up with Mr. Moran as to the condition of the weather on the 5th and also on the 15th.

The COURT.—You are insistent on the matter; I presume you have good reason, and I will allow the testimony in; but I will be frank with you, and say if there were a jury here I would not do it. You will have an exception, Mr. Brown.

Mr. SANDERS.—(Q.) Now, I will ask you, Mr. Moran, have you in mind, or do you recall the condition of the weather on the 10th to the 15th?

A. As I recall it, the weather was pleasant and no storm.

Q. Now, Mr. Moran, you have described to the Court the tracings from this point here, which you designate as “2,” and this one, as a break, “Main break in the dam,” and have said they were about a foot wide and a foot deep, on the 10th; was that the true date that [24] you went there and saw it?

A. On the 10th.

Q. Now, was there any water running from the main break, through the watercourse down to the mud designations on the map?

(Testimony of W. J. Moran.)

Mr. BROWN.—We object to it on the ground it is immaterial and irrelevant, and not responsive to any issues.

The COURT.—I will allow the question. You may have an exception.

Mr. BROWN.—We note an exception.

WITNESS.—I would not say it was exactly running water; it was a sort of a seepage in the watercourse.

Mr. SANDERS.—(Q.) How was it at the point marked "11-watercourse"?

A. It was in the same condition as this watercourse, seepage water there.

Q. And how was it that you described this as a dry channel; what was the depth and dimensions of that dry channel?

A. Well, I think that was approximately a foot or so, just about a foot wide and a foot deep. I have those measurements, I believe I can look them up.

Q. I would like for you to look up the measurements of those. Now, in following these points marked watercourses, did you have any difficulty in getting over or going through the ground?

A. Yes, this was very muddy through here; it was difficult to walk through it.

Q. Now, give the Court some idea of the distance which was covered by this muddy condition of the surface.

A. Well, this here is approximately 10 feet wide; this section from the forks here down to this point.

(Testimony of W. J. Moran.)

The COURT.—That can't get into the record very definitely.

WITNESS.—Well, from the point where the color starts to the point to where it spreads here.

[25] The COURT.—That is the brown.

WITNESS.—Just about two hundred feet in length; that was possibly ten feet in width.

Mr. SANDERS.—(Q.) Well, now, what was the width or area of the balance of the mud tracing?

A. This widest portion here, that is, the widest part of that portion colored brown, is possibly sixty feet.

Q. About what was the width as it extended down on to the end of the mud tracing?

A. That is where it enters this road?

Q. Yes, where it enters that road.

A. That was about twenty feet wide, or twenty-five.

Q. Now, outside of the points of the tracing, the mud tracings, tell the Judge what was the surface condition of this whole area extending from the main break in the dam onto the point that you reach the road, or where you reach the road.

A. That is through this section here?

Q. Yes.

A. That was all covered with tailings, pretty generally saturated.

The COURT.—(Q.) For how far north of the dam?

A. Well, it is—oh, possibly five or six or seven hundred, possibly a thousand feet; it runs out onto

(Testimony of W. J. Moran.)

the flat here; the tailings flow away on a gradual slope.

Mr. SANDERS.—(Q.) Was there any vegetation of any kind on that area of ground that you have described? A. No, sir.

Q. Was there any sagebrush, or anything of that character? A. No, sir.

Q. And this wagon-road, as you stated, led from the postoffice out in a northerly direction to these different sections of country that you have described?

A. Yes, sir, it goes westerly for several hundred feet from the postoffice, and turns; that is, going [26] this road here. There is another road, the usual travelled route from the postoffice across the track, and on the south side of the track you turn in here, and then to the depot.

Q. But regardless of how it leaves the postoffice, in its ultimate course it assumes one road that leads out into this northern country? A. Yes, sir.

Q. You spoke of an outer dam and an inner dam, tell Judge Farrington what you mean by that.

A. Well, these tailings,—this outer dam is from, possibly four or five feet, or six or eight or ten feet high, along through here; and there is an inner dam, possibly more than one, where the tailings have been caught up in here and impounded, and the dam is possibly twenty or thirty feet in height.

Mr. SUMMERFIELD.—The only one that is indicated on the map is the outer dam.

(Testimony of W. J. Moran.)

Mr. SANDERS.—(Q.) Now, do you recall whether or not there was any person on the embankment, the outer embankment of the dam, on the 10th when you were there?

A. Yes, sir, I believe that I recall a man on the dam there, I could not say at just what point.

Q. What was he engaged in doing?

A. He seemed to be repairing the dam, or building up the dam—shovelling tailings; I believe he was building up the dam.

Q. You have known this section that you have described since 1905?

A. Well, generally; I don't know as I was at Millers that early; I was through there going in.

Q. You have had knowledge, though, of the existence of that outlet there by the people of the country down there?

A. That is the outlet of the tailings?

Q. No, the outlet of that road? A. Yes, sir.

[27] Q. Did you see any carcasses of sheep there, if you recall, on this date?

A. No, sir, I believe there was—on the 10th?

Q. Yes.

A. Also on the 14th, I believe there was a couple of pelts there, but no carcasses there.

Q. A couple of pelts lying where?

A. It seems to me they were on this side of the road, in through here (indicating on map).

Q. That is on the east side? A. The east side.

Q. Are you familiar with the Sodaville road?

(Testimony of W. J. Moran.)

A. Well, partially, not all the way through to Sodaville.

Q. Have you ever travelled the road from Millers to Sodaville? A. No, sir.

Mr. SANDERS.—I think that is all.

Cross-examination.

Mr. BROWN.—(Q.) How far is the postoffice from the pump-man's residence, approximately?

A. Well, that, I should say is about eighteen hundred feet, maybe a little less than that, about eighteen hundred approximately.

Q. Are there residences and business places around the postoffice and in that vicinity, and if so, state about what distance from the postoffice?

A. Well, there is pretty generally in the immediate neighborhood of the postoffice, in the rear of it, and alongside of it there are both business houses and residences.

Q. Do you know the population of Millers?

A. No, sir, not exactly.

Q. At the point marked "1," thence northwesterly, you have indicated on the map several segments of road; at one point three of them appear to run approximately parallel, two being colored blue [28] and one being colored brown; what is the distance between the two outer roads?

A. The two roads indicated in blue?

Q. The two of the three roads—the two outer roads of the three.

(Testimony of W. J. Moran.)

A. That is the one indicated in brown and one in blue?

Q. What is the distance between the easternmost and westernmost of the three roads?

A. That is possibly fifty feet, is the widest portion.

Q. Will you mark 14 or 15 at the point here?

A. I will mark it 12. (The point is marked on the map by the witness "12.")

Q. At point "12" four segments of road converge or come together? A. Yes, sir.

Q. At a distance one hundred feet southerly from point "12," what is the distance between the easternmost and westernmost of the four roads?

A. That is about seventy-five or eighty feet.

Q. Now, on the 14th of February did you find any sheep tracks on what you designate "Main wagon-road," at a point south of the pump-man's residence?

A. No, sir, I didn't notice particularly.

Q. Did the sheep marks mentioned by you on your direct examination indicate to you where those sheep came on to the road?

A. Why, all the tracks seemed to be on the east side of the road, with the exception of these few here by the small pools.

Q. The tracks were in the open country?

A. Yes.

Q. And approached the road from the open country? A. Yes, sir, I would say that it right.

Q. And at a point near point "1" on the map?

A. Well, I think they approached the road along here for several hundred feet; I noticed tracks

(Testimony of W. J. Moran.)

through here, possibly two hundred and fifty or three hundred feet.

[29] Q. A band of fifteen hundred sheep coming onto the road from an easterly direction, and from off the open country, would present a front of tracks a couple of hundred feet wide, would they not?

A. Yes, I think they would.

(A recess is taken at this time until 1:30 P. M.)

AFTER RECESS.—1:30 P. M.

Cross-examination of Mr. W. J. MORAN, resumed.

Mr. BROWN.—(Q.) The sheep tracks did not indicate that sheep had been driven up and down the road, did they?

A. Well, I could not say as to that; it was so numerous there it would be kind of hard to tell.

Q. The pond and the mill are conspicuous physical objects in the country there, are they not?

A. Yes, sir.

Q. A person could not be there in that vicinity without knowing that that was a mill-pond, could they? A. No, they could not be very close.

Q. How close did these sheep come to the edge of that pond?

A. I would say—to the edge of this tailings dam?

Q. Yes.

A. That is about seven hundred or eight hundred feet.

The COURT.—(Q.) Do I understand they didn't come within six or seven hundred feet of the dam?

A. Seven or eight hundred feet.

(Testimony of W. J. Moran.)

Mr. BROWN.—(Q.) How far is Los Kamp's house from the nearest point of the tailings dam?

A. That is the pump-man?

Q. Yes.

A. That is about six hundred and fifty or seven hundred feet.

Q. And the sheep tracks indicated that they came right around in the immediate vicinity of his house, did they not? A. Yes, sir.

[30] Q. Came onto the road by passing his house from the open country?

A. Well, I could not say exactly.

Q. Well, the sheep tracks indicated that, didn't they?

A. The sheep tracks would indicate they came from an easterly direction, down over a little raise in here several hundred feet from this road, of the place where I was making the survey; all the tracks were in here, they came over a little raise and came down to this Dry Lake.

Q. And approaching that point where the sheep were killed, a man in charge of the sheep could not help seeing the mill-pond, could he?

A. Well, I could not say just how close he would have to be; there is a little raise in here; I didn't go out into this territory in through here, but there is a little raise right in here, and he drops over this raise down into this Dry Lake; I could not say how far easterly you would have to be if this view of the dam was hidden from you.

Q. You can see the mill from Tonopah, can't you?

(Testimony of W. J. Moran.)

A. Yes.

Q. And that is how far from the mill?

A. Thirteen miles.

Q. You can see the mill from any point in and around Millers, can't you? A. Yes, sir.

Q. And also the tailings pond?

A. No, you cannot see the tailings pond from any point around Millers; the mill and the buildings here would hide the tailings pond.

Q. That is true, but any point on the north side of the mill, or the east side of the mill, you could see the pond, couldn't you?

A. Yes, you could see that for quite a distance in that direction.

Q. Any person familiar with a mining country would know what it was, wouldn't he?

A. Yes, I think so.

Q. You stated that the tailings from the pond showed out on the flat to the north, a distance of six hundred to a thousand feet; how [31] deep did the tailings show?

A. Oh, I could not tell exactly; they are evidently quite deep in the immediate vicinity of the dam, and they gradually find their way out by floating out towards the flat.

Q. That is nothing more than the accumulation of a recurrent break or discharge from the pond, is it?

A. Why, you mean an occasional break in the dam?

Q. Yes. A. Why, I could not say as to that.

(Testimony of W. J. Moran.)

Q. Well, the defendant company impounds its tailings, does it not? A. Yes.

Q. And sometimes those tailings break and escape, don't they? A. Yes, sir.

Q. This company does not let its tailings run loose there as some other companies do in that country, is not that a fact? A. Well, I don't know.

Q. Do you know where the Belmont Mill is?

A. Yes, sir.

Q. How far is the Belmont Mill from the Desert Power Company Mill?

A. That is, from the mill proper of the Desert Power?

Q. Yes, from the mill proper.

A. Oh, it is possibly a quarter of a mile, or some such matter.

Q. To the west?

A. Two thousand feet to the west.

Q. That is a mill of a similar nature, isn't it?

A. Yes.

Q. Both mills engage in the same business?

A. Yes.

Q. The Belmont Mill allows its tailings to run at large, doesn't it?

Mr. SUMMERFIELD.—We object on two grounds; first that any answer responsive to the question is not in cross-examination.

Mr. BROWN.—I will withdraw it.

Q. The defendant company does not allow its tailings to run at large, does it?

(Testimony of W. J. Moran.)

A. No, I think they attempt to confine them.

Q. It appears to be their effort to confine them. Now, the tailings [32] that you find discharged out on the flat north of the pond, is evidently a recurrent and occasional discharge resulting from break in the dam, isn't it?

A. Well, I could not say as to that; they had probably been accumulating there for a long time; there is quite an accumulation of tailings there, might date back for several years; I could not say.

Q. You could not say how deep it is out on the flat?

A. Well, it is fairly thin out on the flat, and, of course, the flat extends for a good many miles across there.

The COURT.—What do you mean by “fairly thin”? A. Well, it runs down here to—

Q. (Intg.) No, I mean some definite idea. “Fairly thin” may mean an inch, it may mean a foot, and it may mean several feet.

A. Well, a coating of an inch, or a fraction of an inch.

Q. That is what you mean? A. Yes.

Mr. BROWN.—(Q.) Now, what distance out there would you say it is of that depth—the last statement?

A. Oh, I could not say; I didn't follow the tailings out to the extreme northern boundary to where they are flowing; I went out pretty well along north of the tailings dam, probably a thousand or fifteen hundred feet; they are scattered pretty well out through

(Testimony of W. J. Moran.)

the country there; there is sand hills settled in through the—those little sand hills; I could not say just how far out from the dam.

Q. You stated in your direct examination this morning that the country to the north there is level; if it is level, how would the tailings get down?

A. Well, I stated that from this point here, it is practically level; I think I indicated a point in here; and it is level in this [33] direction over here (indicating on map); and I think possibly eight hundred or a thousand feet from the dam in this direction, northwesterly. I believe it strikes the level country in there; there is quite a fall between this tailings dam, and a thousand feet northwesterly from the dam.

Q. Now, you spoke of fresh channels there in your direct examination, leading away from one of the breaks in the dam; do you mean to indicate by the term "fresh channels" that those channels were made immediately preceding your first visit to the ground, or were they channels that had existed for some considerable period of months?

A. Well, by "fresh channels," I meant to indicate channels that had evidence of running water a very short time previous to my visit there.

Q. They may have been old channels with some indications of recent flow in them, is not that a fact?

A. Well, that may be true.

Q. Isn't it your judgment that those were old channels? A. No, I could not say as to that.

Q. You have no judgment on that point at all?

(Testimony of W. J. Moran.)

A. No, sir; I could not say.

Q. You spoke of repairing a break with fresh mud; if the repairs were made and a freeze came immediately thereafter, a subsequent thaw would give that the appearance of fresh mud, wouldn't it?

A. Well, it might.

Q. The day that you were there was a sunshiny day, was it not?

A. I believe it was; it was pretty fair weather all during my work there, from the time Mr. Sanders and I visited the ground until I completed the survey.

Q. And that covered February 10th to February 15th? A. Yes, sir.

Q. And you were there during the middle portion of the day as a [34] rule?

A. Yes, sir; I was there all day, started about eight o'clock in the morning, and was there until possibly five in the evening.

Q. Now, in freeze and thaw weather, how could you tell how fresh a segment of ground might be; would you have any means of telling how fresh it was?

A. Well, the shovel marks were very distinct where they had shoveled this mud up, the imprint of the shovel was very plain, the point they shoveled from, and also the dirt that they shoveled up.

Q. Are not shovel imprints equally conspicuous on dry ground? A. No, sir.

Q. Mr. Heydenfelt, after the first questioning of the propriety of your making the survey there with-

(Testimony of W. J. Moran.)

out his consent, withdrew his objection, and allowed you to make the survey, did he not? A. Yes, sir.

Q. In what township, range and section are the lands situated designated on the map?

A. Township 3 north, range 40 east.

Q. State it again.

A. Township 3 north, range 40 east.

Q. What section is it?

A. It is in sections 10 and 11, I believe.

Q. Are you sure about that?

A. I didn't tie to a section corner in there, but I have had other corners in the neighborhood, and I have used some other maps that I had in the office as records.

Q. You didn't take that data?

A. No, sir; I didn't have a Government corner there that I tied to when I made the survey.

Mr. BROWN.—That is all.

[35] [Testimony of W. D. Jones, for Plaintiff.]

Mr. W. D. JONES, called as a witness on behalf of plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. SUMMERFIELD.

Q. What is your name? A. W. D. Jones.

Q. Where do you live, Mr. Jones?

A. Reno, Nevada.

Q. How long have you resided in Nevada?

A. Since 1868.

Q. Do you know where the town of Millers is?

A. Why, I think so; I have been through there a few times.

(Testimony of W. D. Jones.)

Q. You formerly lived in the vicinity of Austin, did you not? A. Yes, sir.

Q. Have you any knowledge of a road, Judge Jones, running from in the Austin vicinity and down through Millers, or in the vicinity of Millers and Sodaville, and to Silver Peak?

A. There are a number of roads that run from Austin to the south end of the Toyabe Range of mountains.

Q. Well, what, if anything, do you know about any road running either through Millers or in the immediate vicinity of Millers?

A. Why, I know there is a road from San Antone or Cloverdale, either one, to the vicinity of Millers.

Q. How long have you known of that road?

A. Since about 1877 or 1878, I am not sure which of those years.

Q. What portion of the road were you the most familiar with? A. From where?

Q. Of the road mentioned; what portion of the road mentioned were you the most familiar with; what section or segment of the road?

A. Well, I have frequently gone from Austin, either south and into Smoky Valley, and down Smoky Valley to San Antone, and out across the desert from San Antone in a southerly direction, possibly [36] a little west of south from San Antone, possibly about south, I would not be sure as to the exact direction, to the vicinity of Millers. I have gone up Reese River, from Austin to Cloverdale and

(Testimony of W. D. Jones.)

San Antone, or else took the cutoff road west of San Antone, and went to the well that stock-men had out there on the desert, and to Montezuma Well, and on to the vicinity of Millers, a number of times.

Q. I hand you, Judge Jones, what purports to be a map by the United States Geodetic Survey, and will ask you by reference to that if you can indicate a little more clearly that road from the ones you know of, from where you resided to the vicinity of Millers, and beyond that, if possible.

A. I find near the top of this map one marked "Millet's Ranch," that is forty-two miles from Austin, down Smoky Valley; and Darrough's Ranch, I have forgotten how many miles; and Hot Springs, from the same place I have forgotten how many, but it is twelve or fourteen miles, I think, from Millett's to Darrough's, possibly not quite that far; Wood's Ranch is beyond Moore's, Moore's should be right close; Cold Springs should be right close to Darrough's, half a mile. The next point I am familiar with is Wood's Ranch, which is in the valley about half way between Jett's Canyon and what is known as Round Mountain. Going on from Millett's down Smoky Valley, it is westerly, west of south, to Peavine, or by the mouth of Peavine Creek. Manhattan should be there nearby, across the valley, and to San Antone. That was one route that we usually took going down there. San Antone is at the southwest end of Toyabe Range of mountains; the Toyabe Range of mountains is the range that runs from

(Testimony of W. D. Jones.)

Austin south, between Reese River Valley on the north side and Smoky Valley on the south side; and from San Antone we went out to the well; we called it the "Well"; my recollection is [37] it was about thirteen or fourteen miles from San Antone to the well that the cattle-men dug out there.

Q. Did you have anything to do with that?

A. Why, yes, sir; I helped pay for digging it; I don't recall whether I helped to dig it or not, but I helped to pay for it; quite a number of stock-men joined in digging the well. And further on south, ten miles—it might have been twelve, and might have been nine—is Montezuma Well; and possibly five or six or seven miles further south was a place where Millers is now located.

Q. And then from Millers?

A. I don't recall that I ever personally rode much further south than where Millers is now located. The snow line generally stopped us out there from our direction, and we could not get much further, we would not find cattle much further than the snow line.

Q. I will ask you to state to the Court, Judge Jones, if you are able so to do, whether the road which you have delineated was a commonly publicly travelled road or not.

A. Well, it was the road—

Mr. BROWN.—(Intg.) I will ask the question be read.

(The reporter reads the question.)

(Testimony of W. D. Jones.)

Mr. SUMMERFIELD.—I should say “traced” instead of “delineated.”

Mr. BROWN.—We make the same objection we made this morning.

The COURT.—It will be the same ruling. Does he identify this road that is under discussion now as a part of that thoroughfare that he went over?

Mr. SUMMERFIELD.—I will ask the question—well, I suppose he had better answer the question first.

The COURT.—Very well.

Mr. BROWN.—We note our exception.

The COURT.—All this testimony with reference to that map will [38] go under that objection, will it not?

Mr. BROWN.—Very well.

WITNESS.—There was a road from Austin to the point that I have described; of course the road from Austin to San Antone, and from Austin to Cloverdale, was more travelled than the road from San Antone or Cloverdale out onto the desert, but there was a road all the way.

The COURT.—Well, the road from Cloverdale to Millers passed by the spot where these sheep were killed?

A. I don't know where the sheep were killed. The road from Cloverdale goes to the well—the two wells that I have mentioned—and to the vicinity of Millers as it now is, and so does the road from San Antone; when you get to San Antone you diverge and go off across the desert to the well; if you are at

(Testimony of W. D. Jones.)

Cloverdale you come down here, and you can either stop at San Antone, or you can take the cut-off down there, a straighter road, and strike the road between San Antone and the first well, and go on to the two wells in the vicinity of Millers that I have described.

Mr. SUMMERFIELD.—(Q.) Have you been through Millers within the last year or two?

A. No, not within the last year.

Q. Well, within the last two years.

A. I have been through Millers probably four or five times since Millers was a town.

Q. Now, in passing through, did you notice whether this road you have mentioned as having known for a good many years, whether it ran out from Millers across to the—

A. (Intg.) I have noticed a time or two passing through Millers on the train, that there was the old road that I had ridden over when hunting cattle many years ago.

Q. Well, is that the one that you have mentioned in your testimony?

[39] A. Yes, sir.

The COURT.—How far is the road you noticed from Millers?

A. Why, it is right there in the vicinity of Millers; I don't know whether it was three hundred yards, or a quarter of a mile; I took it there as the old road that I had formerly known; I was not impressed with it when I was looking at it, only to decide for myself that here is the country I have been in before there

(Testimony of W. D. Jones.)

were any habitations. You want to understand that the road down in that vicinity was not travelled anything like the roads further north, but prospector's wagons went across it, and pack-trains.

Q. Was there more than one road putting out from Millers to the north?

A. I don't recall but the one road; we would go down there and divide out outfit up. The neighbors up in my neighborhood would go down there in the springtime to assist in getting the weak cattle back through the snow, the strong ones would come back by themselves; and we would divide up in bunches of two or three; probably ten or twelve of us would be in an outfit, and we would ride in different directions regardless of roads, unless it was those going further south; they would take the road for a few miles going down; but we always regarded that road as our trail to come back on; if we were after night we would find the road, if it was the daytime; it didn't make much difference.

Q. Did you travel that road as early as 1868?

A. No.

Q. How early did you travel that road?

A. Not till 1877. I was in Austin in 1876; I didn't commence to ride for cattle until 1877; and I think it was the second season that we dug that well down there, it might have been the third, it might have been 1878; but there was no water at all between San Antone and that other well, that Montezuma Well, and we were pretty energetic to get some water

(Testimony of W. D. Jones.)

down there so we could stay a little [40] longer and do a little more work.

Mr. SUMMERFIELD.—(Q.) Does this map, Judge Jones, correctly indicate your recollection and your personal knowledge of the course of the road?

A. I would not say that it correctly mathematically indicates it, but approximately it is correct, I would say, the general course. I notice that the road from San Antone diverges from the west considerable, and I have often noticed that from actual experience, that you had to wind around the sand dunes and the sand to get out on the desert to start toward our well; our well was twelve or thirteen or fourteen miles from San Antone on that road; I think the Montezuma Well was something like the same distance, I would not be sure; we always guessed the distances in those days, but the scale of the map ought to show whether the distances are approximately correct or not, and I have not consulted that.

Mr. SUMMERFIELD.—I think that would show for itself. Unless counsel have objection, this map will be offered in connection with the witness' testimony.

Mr. BROWN.—We make the same objection formerly made. And furthermore, that it does not identify it with the road here in question. The witness expressly states that he does not know where the sheep were killed.

Mr. SUMMERFIELD.—I am not introducing it for that purpose, if your Honor please; it is for the

(Testimony of W. D. Jones.)

purpose of illustrating the witness' testimony in connection with the other testimony.

Mr. BROWN.—We object to it generally as immaterial unless it identifies the road that is here in question.

Mr. SUMMERFIELD.—I think he has already testified to that.

The COURT.—Does this map show a road running into Millers from the north?

[41] Mr. SANDERS.—Yes, every road in that country.

The COURT.—I will admit the map. It will be understood that you have an objection to all this testimony, Mr. Brown, and also an exception; but if there is any additional objection, you will have to call my attention to it later.

(Map of U. S. Geodetic Survey marked Plaintiff's Exhibit "B.")

Mr. SUMMERFIELD.—You may cross-examine.

Cross-examination.

Mr. BROWN.—(Q.) Judge, you herded cattle in there between what years, over the roads you have referred to?

A. We only went there in the springtime, Mr. Brown, for a few days to get our weak cattle back; I didn't have a regular camp out there at all.

Q. Wasn't it a particularly good cattle country?

A. Yes, for the winter, when the snow came cattle would go usually on the desert there, and get fine feed, as far as the snow would let them go.

(Testimony of W. D. Jones.)

Q. Do I understand you to say that favorable range country terminated about where Millers is?

A. That is as far as our cattle would go; as we would generally go to hunt them further than that we would not find enough to justify us.

Q. It was not much below that, and that was the extreme southern limit for cattle?

A. Well, we counted that about the limit.

Q. Water was scarce in there?

A. There wasn't any water at all for cattle in that vicinity, except the snow.

Q. Anyone driving cattle through that country would stick to the [42] snow hills?

A. They would have to; I never drove clear through, but they would have to, or go around some other way.

Q. Any person driving cattle or sheep through the country would not find that a desirable section to drive through?

A. Well, I never was south of the vicinity of Millers that I recall; I don't think I was.

Q. Did you ever go into Tonopah during the stage-coach days?

A. Yes, sir; I didn't go on the stage-coach; I have gone into Tonopah from Austin with my own team, by this first well, and then some distance, a little distance, beyond there, turn to the left, and took the new road that went by to Tonopah.

Q. The old stage-roach road ran through Crow Springs, didn't it?

(Testimony of W. J. Moran.)

A. I never was on that stage-road that I know of; I have gone down from Belmont through the grass flat, and across the hill, and came into Tonopah that way a time or two; and I have gone by the wells several times, and up the way I have already described; but I never went into Tonopah on a stage or came out of there on a stage.

Q. When you refer to the "Wells," what do you mean?

A. I mean the well thirteen or fourteen miles from San Antone on the road in the vicinity of Millers.

Q. Where would that well be from Tonopah?

A. It would be eighteen or twenty miles this side of Tonopah.

Q. Where would it be from Millers?

A. It would be about fourteen or fifteen miles, I should think, from Millers.

Q. Millers is about thirteen miles west of Tonopah?

A. I don't know just the distance; I can see Tonopah from Millers when I am on the train.

Q. When was the last year you operated in there?

A. Cattle?

[43] Q. Yes.

A. I think about '86; I was elected district attorney of Lander County that spring.

Q. When you knew the road through that section of country, it was absolutely barren country, there were no buildings at the place where Millers now stands?

A. No habitations south of San Antone that I

(Testimony of W. D. Jones.)

saw; we didn't go clear across the desert and down to any of the localities down there; there wasn't any habitation at all beyond San Antone, as far as I went.

Q. You have been through Millers a number of times since the town was established?

A. Only a few times.

Q. You observed that there was a small town there? A. Yes.

Q. A town supported by two milling plants?

A. I didn't know whether it was one or two; I never have stopped off there, just passed through.

Q. In a community of that sort, there would be roads and highways, going in different directions; would you be certain that any particular road in that vicinity is the old road that you used to know—you would not be positive of that, would you?

A. I simply satisfied myself the first and second time, I think, that I passed through Millers, now here is the valley in which I used to ride for cattle, and took a casual observation from the train, and made up my mind there is the old road that we used to travel down here when we were riding for cattle; I never thought anything more about it.

Q. Do you know how many years have elapsed since you have known that old road?

A. I hadn't been there since 1886 until I went there on the train.

Q. And this was a great big open territory, a great big open valley there? A. Yes, sir.

[44] Q. The town of Millers is a pretty small

(Testimony of W. D. Jones.)

point compared to the whole area of that big valley, isn't it? A. Yes.

Q. You would not be positive, would you, that Millers is located right in the immediate vicinity of that old road?

A. Not any more so than I satisfied myself that that is the old road; I could be mistaken; I satisfied myself that that was the old road.

Q. Could you pencil out on this map the old road, and be certain of your delineation?

A. I could draw you a pencil line that I think would satisfy me.

Q. Would you be willing to give it all the standing of a positive statement under oath?

A. No, I don't think I would, no; I don't believe the man that made that map could do that with those roads; he might the distances.

Q. And he might not be able to do it on the road?

A. I don't think so. I have had a good deal of experience along that line; I can't draw much of a map, Judge Brown; I know men will differ on drawing a line through a piece of land as to where a road runs.

Q. And others who might have been familiar with this road as you knew it, might differ with you as to locality?

A. I don't know whether they might or they might not; if we didn't agree we would certainly differ; I am not swearing to you positively that that road as delineated on that map is correct, and I could not undertake to draw you one that is correct; but I can draw you a map of what my remembrance is of the

(Testimony of W. D. Jones.)

road from Austin to the vicinity of Millers so that I believe any intelligent fellow could follow it in the daytime with a buggy and team, or saddle horse.

Q. Was the road anything more than a cattle trail?

[45] A. Oh, it was an ordinary road from San Antone out, showing the two wagon tracks, only occasionally wagons passing over it, though.

Q. It was not used very much?

A. It wasn't travelled nearly so much, nothing like as much from San Antone to Cloverdale south as from San Antone to Cloverdale north.

Q. Could you identify that road by reference to the postoffice at Millers?

A. No, sir; I haven't any idea where the postoffice at Millers is; I never was off the train at Millers in my life.

Q. Where would it be with reference to the railroad station; which side of the train did you look out to see that road? A. North side.

Q. Where would the road be with reference to the mill of the Desert Power and Mill Company?

A. I don't know where the mill is; I know it is on the north side of the track, that is my remembrance of it, and my recollection is that the road was east of that mill plant, or the enclosure.

Q. How far from that would it be?

A. I would not undertake to say.

Mr. BROWN.—That is all.

By the COURT.—(Q.) Judge Jones, did you say this old road you have referred to was east of the

(Testimony of W. D. Jones.)

mill, as you recollect it?

A. My recollection is it is toward Tonopah from the enclosure; there was a high board fence around something there, I didn't pay much attention to it; I heard it was a milling plant of some kind, and my recollection is it was toward Tonopah, the road was, from that fence.

Q. And that would be east of the fence?

A. Well, I was going toward Tonopah, and looking north from the train.

The COURT.—That is all, thank you.

[46] Mr. SUMMERFIELD.—With the permission of the Court, gentlemen, I want to see whether we can agree to one phase of this testimony or not: Shortly after the sheep were killed, samples of water were taken by Mr. Sanders from the point where they were killed, by him transmitted to the Sierra Land and Livestock Company at Reno, received by Mr. Blum, its secretary, by him delivered to Mr. Silas Ross, chemist at the university, by him analyzed, and retained in his possession, and in his possession at the present time. The witnesses are here, and I wish to know whether you want us to call them for identification or not?

Mr. BROWN.—No, the case may be shortened, and we will consent that those witnesses need not be called.

Mr. SUMMERFIELD.—I will ask further if you would like an analysis of the water?

(Testimony of W. D. Jones.)

Mr. BROWN.—I think we admit that in our answer, practically.

The COURT.—The admission is, then, that the samples of water Mr. Ross has were taken from the point where the sheep were killed, by Mr. Sanders?

Mr. SUMMERFIELD.—I understand that is admitted.

Mr. BROWN.—Yes, we admit it.

Mr. SUMMERFIELD.—The other point I had in mind was whether to call Mr. Ross to testify to the analysis, or not.

Mr. BROWN.—No, you need not call him.

Mr. SANDERS.—It is admitted that it was cyanide water at that point.

Mr. BROWN.—Yes.

Mr. SANDERS.—And from that the sheep died?

Mr. BROWN.—Yes.

The COURT.—Does that admission cover the date when the samples were taken?

Mr. SUMMERFIELD.—Yes, I said it was immediately thereafter.

Mr. BROWN.—Yes, we admit that.

[Testimony of William C. McGarry, for Plaintiff.]

[47] Mr. WILLIAM C. McGARRY, called as a witness on behalf of plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. SANDERS.

Q. Where do you reside, Mr. McGarry?

A. Park City, Utah.

(Testimony of William C. McGarry.)

Q. Where did you reside on or about the 5th of February, 1914? A. At Millers, Nevada.

Q. Were you residing there?

A. Well, I was there that day; I was residing in Pioneer, Nevada.

Q. How long did you live at Pioneer?

A. About four years.

Q. In what county is Pioneer?

A. Nye County.

Q. What was your business or occupation at that time? A. I had a water-wagon there.

Q. A water-wagon at Pioneer? A. Yes, sir.

Q. What was your occupation on or about the 5th of February, 1914? What were you doing then along about that time, and before that?

A. I was with some sheep.

Q. Whose sheep were they?

A. The 5th of February they were Wheeler & Holcomb's.

Q. How many of them were there?

A. 1,565, I believe, I would not be sure of the count.

Q. When did you first become acquainted with those sheep?

A. Why, about eighteen months before that.

Q. What was your connection with them?

A. I owned a half interest in them.

The COURT.—(Q.) You owned a half interest?

A. Yes, sir.

Mr. SANDERS.—(Q.) Who owned the other half?

A. Lawrence Kimball.

(Testimony of William C. McGarry.)

Q. What was Kimball's business or occupation?

A. He is a rancher and stockman.

[48] Q. A rancher and stock-man, residing how far from Pioneer? A. About four miles.

Q. What is the valley called that he lives in?

A. Springdale Valley, on the Amargosa River.

Q. About the head of the Amargosa?

A. Yes, sir.

Q. You say you had been connected with this band of sheep for about eighteen months? A. Yes, sir.

Q. Previous to the 5th of February, 1914?

A. Yes, sir.

Q. Now, did you have occasion to move those sheep? A. From Springdale?

Q. Yes. A. Yes, sir.

Q. At whose instance and request were they moved? A. At Mr. Holcomb's.

Q. Was any instruction given you by Mr. Holcomb, or any other party, as to what to do with those sheep?

A. Well, I was to move them up north here towards Rawhide, where they had some other sheep that they were going to put them with, and move them onto their lambing ground.

Q. Lambing and shearing together, or was anything said about shearing?

A. I suppose so; it was just about the lambing season.

Mr. BROWN.—I move to strike the answer out as a supposition.

(Testimony of William C. McGarry.)

Mr. SANDERS.—(Q.) I ask whether anything was said as to moving those sheep to a point where lambing and shearing was to be done?

A. There was about lambing, I have no recollection about shearing.

Q. These sheep were to be joined with other sheep at the point of Rawhide?

A. Somewhere in the vicinity of Rawhide.

Q. What date did you leave Springdale or vicinity, with the sheep? A. On the 23d day of January.

Q. Who, if anyone, was with you?

A. Pete Lamont.

Q. Who is Pete Lamont?

[49] A. He is the man that was herding sheep.

Q. He was employed by whom?

A. He was employed by us until we sold them, and when we sold them he was employed by Mr. Holcomb.

Q. What date did you say you started out with them? A. The 23d of January.

Q. You and Pete? A. Yes, sir.

Q. What was your mode of conveyance?

A. We had a wagon, a two-horse wagon.

Q. How was that wagon arranged and prepared?

A. Why, there was a stove and bed and cupboards and everything built right in the wagon.

Q. Had it ever before that time been used for the purpose of following bands of sheep?

A. Well, we had used it all the time.

Q. And you and Pete started out on the 23d?

(Testimony of William C. McGarry.)

A. Yes.

Q. Now, just tell the Court, Mr. McGarry, what course you took, and about your average distance per day, and what direction you approached, if you did approach, the town of Millers?

A. Well, we left—

Mr. BROWN.—One moment! If this answer is to cover a movement of sheep from one county to another, I object to the testimony unless it is shown that they complied with the law, and procured a statutory permit from the proper officers, permitting them to make a lawful movement of sheep from one county to the other. The statutes require that when sheep are moved from one county to another in this State the owner of the sheep shall procure a permit for that purpose. Until they show they have procured the permit, I object to the testimony.

[50] The COURT.—(Q.) In what county is Springdale? A. Nye County.

Q. And Millers is in Esmeralda County?

A. Esmeralda County.

Mr. BROWN.—Their destination was Mineral County; Rawhide is in Mineral County.

The COURT.—(Q.) Then you had passed out of one county into another when this thing happened?

A. Yes.

The COURT.—The testimony will be admitted subject to that objection.

Mr. BROWN.—Note our exception.

The COURT.—Unless you are prepared to produce the permit?

(Testimony of William C. McGarry.)

Mr. SANDERS.—What is that, your Honor?

The COURT.—I don't suppose you have the permit, have you?

Mr. SANDERS.—No, sir; we don't have to have any.

The COURT.—You may proceed.

WITNESS.—When we left there we figured on some days we would make five miles, some days ten miles, and we camped just about whenever we had to; we came right along the wagon-road all this way; we couldn't get off the wagon-road, couldn't take the team off of the wagon-road; and when night would come we would just pull off of the road, probably fifty or sixty yards, and camp.

The COURT.—(Q.) How many miles did you say you made a day?

A. Some days we would make five, and some days seven, and have made some days as high as ten.

Mr. SANDERS.—(Q.) Now, you say you took the main travelled road; just tell the Judge what that main travelled road was from Springdale on up?

A. Well, you leave Springdale, and it is the main travelled auto-road and wagon-road from Springdale to Goldfield, right up from the Bonnie Claire Valley and through Cupright, and [51] into Goldfield, and from Goldfield on down towards Millers, the highway we go down there by; and right across from Ramsey's old well there, Klondike Station, and from Klondike take the old freight road; not the road that goes over the hill into Tonopah, but the old

(Testimony of William C. McGarry.)

freight road that came up into old Millers Junction; we took that road right down into Millers.

Q. You say that you passed Bonnie Claire and Goldfield? A. Yes.

Q. Did the public road lead you by, if you recall, the Bonnie Claire reduction plant and the Goldfield Consolidated Reduction plant?

A. Yes, led me by them, not very close, but within half or quarter of a mile of both of them.

Q. And then you passed on from over the public road to Klondike Wells? A. Yes, sir.

Q. And from there took the old freight road?

A. Freight road.

Q. From that point into Millers?

A. Into Millers, yes, sir.

Q. Now, what was the condition of the thoroughfare or the road, as to being used frequently, or what was its condition as to travel?

A. Why, the roads had all been used frequently, outside of that little piece there where you don't go into Tonopah, where you cut and go right down through the valley, and hit the Tonopah road below there where you get to Millers.

Q. That was the main thoroughfare from Goldfield to Millers that you took?

A. It was the main thoroughfare that I could take.

Q. And the most direct route? A. Yes, sir.

Q. Now, when you got around into the flat leading up to Millers, did this public road touch the railroad at any point? A. It crosses it once.

Q. It crosses the T. & G. Railroad?

(Testimony of William C. McGarry.)

A. Above Millers.

Q. Above Millers? A. Yes, sir.

[52] Q. Now when you crossed the railroad above Millers, as you say, about how many miles was it from that point to Millers?

A. Why, I should judge about three miles, two miles and a half or three miles, I would not be sure on that.

Q. You would not be sure. Well, now, Billy, where did you camp the night before you reached the point where you crossed the railroad that you have described?

A. Why, I camped just this side of McClain's, I believe they call it, McClain's Siding or Tonopah Junction, where the road turns off to go into Goldfield.

Q. That is the railroad?

A. Yes, where it comes out at Tonopah, around the hill.

Q. In other words, the railroad shoots up at that point into Tonopah, and goes around here into Millers? A. Yes.

Q. So you camped right at the junction?

A. Not right at the junction, about a mile below, closer to Millers.

Q. That was on the main thoroughfare?

A. Yes.

Q. And you followed the public road, and crossed the railroad? A. Yes.

Q. What direction was it from this point where

(Testimony of William C. McGarry.)

you camped, to Millers?

A. It was about northwest, I should judge.

Q. It was about two and a half or three miles to that point where you crossed the road to Millers?

A. Yes.

Q. When you got across, how did you get up to Millers?

A. Right on the main wagon-road that goes right into Millers.

Q. On the main wagon-road? A. Yes.

Q. Where were the sheep when you crossed the road?

A. They were back of me somewhere.

Q. The sheep were behind you? A. Yes.

Q. With Pete, the herder?

A. With the herder, yes.

Q. How far were you ahead of them, do you suppose, or can you say?

[53] A. I should judge an hour and a half or hour and three-quarters.

Q. You were travelling in this wagon?

A. I was in the wagon.

Q. You crossed the road and took the main wagon-road then up to Millers? A. Yes.

Q. How does that road run with reference to the railroad?

A. It runs pretty near parallel with it after you cross it; after you get across it a little ways it runs pretty near parallel.

Q. Did you see any other road after you crossed

(Testimony of William C. McGarry.)

the road running in a northerly direction from the point? A. Only the main travelled road.

Q. Only the main travelled road, the road that you took? A. Yes.

Q. Did you see any other outlet from that to the point? A. No.

Q. You say your destination was Rawhide?

A. Rawhide, not exactly, but in the Rawhide vicinity, to catch up with these other sheep.

Q. Where did you go after you crossed the railroad at the point you have described, up into Millers?

A. Up into Millers.

Q. Did you go right into the town? A. Yes.

Q. Tell the Judge exactly what you did after you got into the town.

A. As soon as I got into the town, I tied my team, went up into the street, went into the store and bought a ham, a few groceries and things, went and sat on the wagon in front of Dale's store, and inquired about the water; and from the first man I happened to hit that I could get any information from was Mr. Acree, a-standing right on the porch there of the store, and I took Mr. Acree out to the corner [54] and I asked him if that was cyanide water down there, and he says, "No, that is rain-water," he says, "the cyanide water is all further over, it is all impounded"; so I got my groceries, and drove back up behind the town about a quarter of a mile, I guess.

Q. On which side of the track, the north side?

A. On the south side.

(Testimony of William C. McGarry.)

Q. You drove your wagon from this point on the south side of the town, about how far out of the town?

A. Oh, I should judge a quarter of a mile.

Q. And what did you do when you got there?

A. I unhooked the team.

Q. Camped at that point? A. Camped there.

Q. How long was it before the sheep arrived from the time that you unhooked the team?

A. About an hour and a half or two hours.

Q. About what time of day was that when you unhooked the team?

A. It was about twelve o'clock, between half past eleven and twelve.

Q. Now, you had camped, you say, at this junction of the "Y" of this railroad. A. Yes, sir.

Q. Can you give the Court some idea or estimate as to how far from the point where you unhooked the team?

A. Well, I think they call it nine or ten miles to the junction, but I was about a mile this side of the junction.

Q. Where you camped? A. Where I camped.

Q. Where was the last time that you had watered the sheep before you unhooked and camped there at Millers? A. Right there at the junction.

Q. Found water there, did you?

A. Found water there, and broke it with an ax, the herder and I broke it; it was right in the "Y," right in close to the railroad.

(Testimony of William C. McGarry.)

Q. Now, the sheep arrived about an hour and a half or two hours, you [55] say, after you pitched camp? A. Yes, sir; after I arrived.

Q. What was the next thing you did, Mr. McGarry?

A. Well, I went on down town, around there all afternoon, and I didn't inquire any more about the water, I didn't think it was necessary; I found out, Mr. Acree told me that was rain-water down there; I pointed it out to him, and I asked him "Is that cyanide water*?" and he says, "No, that is rain-water, the cyanide water is impounded, it is further over."

Q. Now, how did you happen to approach Millers on the south side of the town with the sheep?

A. That is the way we came in.

Q. Well, you crossed the railroad track?

A. Yes.

Q. Directly up the railroad?

A. The sheep hadn't crossed the track, however.

Q. I understand, but how did you happen to bring the sheep up to Millers on this main road, along the railroad track?

A. That was the only road I had to go on.

Q. How did you happen to pitch your camp on the south side, the opposite side from the way in which you were going; just explain that to the Court?

A. It was up against the hill, back towards the town, and below there was all a dry lake, and that dry lake is not a good place to camp sheep on at

(Testimony of William C. McGarry.)

night; it is pretty hard to hold them if they are a little bit hungry.

Q. Am I to infer that the reason for your pitching your camp on the south side of the town is because it was a better camping position than on the other side of the town?

A. Better camping position, and I wanted to find out about the water before I went over.

Q. Now, you say the sheep got there, and you went on over into [56] town, and had the conversation you have described, and continued to remain there?

A. Yes.

Q. And when did you go back to the camp?

A. About five o'clock, or half-past five.

Q. Did anybody meet you there at that time?

A. There was a fellow came up there and tried to buy mutton; he came up there before that; he came up at noon; I told him we didn't have any for sale; I says, "There is a few small wethers in here, if you want one we will kill it; we will give it to you for seventeen cents," but, I says, "they are not for sale, but," I says, "we have a few little wethers in here, and if you want one we will kill it for you"; so he came up there that night.

Q. About what time did he come?

A. Just a little before dark, about five o'clock, or half-past five, at that time of year.

Q. Do you know who that man was?

A. I know the man when I see him; I don't know his name, his wife was with him.

Q. Where did you eat that night?

(Testimony of William C. McGarry.)

A. I ate up in Tonopah.

Q. What time did you leave Millers for Tonopah?

A. About eight o'clock.

Q. How did you travel? A. In an automobile.

Q. Do you know whose machine you went up in?

A. One of the young fellows working at one of the mills there owned it; I believe they called him Hine.

Q. How long did you remain in Tonopah?

A. All night.

Q. How did you get back to Millers?

A. Came back on the train.

Q. What time did the train arrive in Millers?

[57] A. I believe it was nine-thirty.

Q. That was on the morning of what day?

A. 5th of February.

Q. Where were the sheep?

A. The sheep were behind Millers, southeast of Millers.

Q. What was done then with the sheep?

A. Well, I went out and saw Pete, and asked him if he had got water, and he said no, he hadn't got water yet; I says, "there is water down there," I says, "we will water the sheep, and then we will go on and pull out."

Q. Did you give him any instructions as to how to put the sheep across the track?

A. He was across then, but he was further out.

Q. Let us get what you mean by being across.

A. Well, he was on the north side of the track.

Q. He was on the north side of the track when you first saw him? A. Further back out.

(Testimony of William C. McGarry.)

Mr. SUMMERFIELD.—(Q.) You mean the railroad track, don't you?

A. The railroad track, yes, sir.

Mr. SANDERS.—(Q.) Now, describe to the Court the condition of the railroad tracks, and with reference to the crossing of the railroad tracks, the way these sheep crossed, and how far from the store you have described was it that they crossed.

A. Well, I should say it was a half a mile.

Q. Did the sheep at any time go through the town of Millers? A. No, sir.

Q. Then was there any way of getting them across from the south side to the north side of the track unless you passed through the town of Millers, other than the way that you took them across?

A. No, sir.

Q. Then when you first saw them after you returned from Tonopah at [58] nine-thirty, the herder had them on the north side of the track?

A. Yes.

Q. How far was it from the postoffice at Millers, or that store where you got the grub?

A. Oh, about three-quarters of a mile, between three-quarters and a mile.

Q. Outside of the town?

A. Outside of the town.

Q. What direction were the sheep going at that time? A. Going north.

Q. What direction was it that you gave to the herder?

(Testimony of William C. McGarry.)

A. Well, north; I pointed across in the hills towards Crow's Springs, and told him that is where we went through.

Q. And told him to give them water?

A. Yes, sir.

Q. What did you next do?

A. I went up town, and told him to get his lunch and to water the sheep, and then pull on, and I went back on up town, because I knew I had quite a time to catch him.

Q. Sir?

A. I say I knew I had plenty of time to catch him.

Q. You followed him with the wagon? A. Yes.

Q. Did you hook up the wagon? A. No.

Q. That morning? A. No.

Q. And you remained there in town; what were you doing that morning?

A. Oh, I was around town, played a couple of games of solo, bought a few more groceries.

Q. And got ready for your journey?

A. Yes, sir; I was ready to go down there; I could have gone in half an hour.

Q. What occurred at that time that was unusual, or something that you would not expect?

A. Well, I was sitting there; it had not been a half an hour after [59] I told Pete to water the sheep, and I was sitting there playing a game of solo, and a fellow came up and he says, "Is the sheepman here?" and I says, "Yes," and he says, "By gosh, they're dying down there by thousands, come down quick"; I jumped up, went down, and found the sheep dying.

(Testimony of William C. McGarry.)

Q. Now, how far was this place where you were playing the solo from the point where you found the sheep dying; could you estimate that?

A. Oh, probably—it is not a quarter of a mile, I don't believe.

Q. Have you ever seen this map on the board here?

A. I never have seen it any closer than this.

Q. Describe to the Judge the condition of the country there where these sheep died.

A. Well, it was a flat, level rocky dry lake.

Q. Was there a road there?

A. A road right through where they died; the water was right in the road, part of it.

Q. From the point where this grocery store was, could you see the road from that point?

A. Yes, and you could see the water.

Q. And you could see the water? A. Yes, sir.

Q. Did you make any inquiry, or was there any inquiry made, as to the direction or the course of that road from that point?

A. I asked Mr. Acree, and he was the one that showed me where Crow's Springs was, and where the road went out.

Q. Now, what was the condition of the place there at the point where these sheep were killed, as to the roadbed—was there water in it?

A. The water was right in the roadbed.

Q. How did these sheep, if you know, approach that road at that point?

A. Well, they swung above the town, back up above the town; that was the only way they could

(Testimony of William C. McGarry.)

come in unless they came right through the street of the town.

[60] The COURT.—(Q.) Is that east of the town? A. Yes, east.

Mr. SANDERS.—(Q.) And swung back up to the road? A. Yes.

Q. And that is the point where they got the water?

A. Yes.

Q. Did they get across the road?

A. Most of them dropped right in the road; some of them got across the road, but they didn't get ten feet across, any of them.

Q. Did you see any sheep dying? A. Yes.

Q. Did you see any of them falling?

A. Yes, lots of them.

Q. Did you know this man that came into the saloon and said, "They are dying like flies"?

A. No, I didn't know him at the time.

Q. What kind of looking man was he?

A. Why, stout, pretty heavy-set man.

Q. Did he have a smooth face, do you remember?

A. No, I believe he has a moustache.

Q. Was anyone present besides yourself, or did anyone go with you from that point out to the place where the sheep fell?

A. I was the first one down there; there was a couple of other fellows started down, but I was down there before they got there.

Q. Who were those fellows, do you know?

A. I could not tell you what their names were.

Q. Did the man that informed you go with you?

(Testimony of William C. McGarry.)

A. Yes, but I was there before he got there.

Q. What did you next do?

A. I put the dogs on them, and got what I could out; then I started back up town, and telegraphed Mr. Wheeler.

Q. Did you send Mr. Wheeler a telegram at that time?

A. Yes, I met the superintendent of the mill coming down in his machine when I started up town, and I got in the machine, and went [61] back down with him; and I put one man to work there myself, and he sent a man over, and told him to bring all the help out of the mill they could to help them; then I got in his machine, and he went back up town with me, and I telegraphed Mr. Wheeler.

Q. Was that all the conversation you had with the superintendent at this time?

A. Well, no, not right at the time it wasn't.

Q. What was said by him at that time?

A. That it was an awful bad thing, and he had no doubt the company would do the right thing, but all he could do was wire the office in Philadelphia.

Q. What arrangement was it you made there; you say that you hired some men?

A. I hired one man.

Q. Who was he?

A. Some stout young fellow there, I don't know his name.

Q. What did you have him do?

A. I had him help the herder to get the sheep out.

(Testimony of William C. McGarry.)

to get as many as he could out.

Q. You mean the live or dead ones?

A. Live ones; at the same time the superintendent of the mill sent a man over to the mill to bring as many men over as they could spare. I went on up town, and when I came back, there were men there, and I suppose they came.

Q. How long were you up town before you went back to where these sheep were?

A. Oh, probably an hour, that is, off and on; I made two trips with this gentleman, the superintendent of the mill down there.

Q. He was with you all the time?

A. No, not all the time; I was coming back up to telegraph Mr. Wheeler before he came down the first time, and I met him, he was coming down in his auto, and I got in, and he went on down, then he came back up with me and took [62] me to his office there, and I wanted to phone to Tonopah, and he said I could phone from there if I wanted to.

Q. Did you phone to Tonopah? A. Yes.

Q. Who did you phone to? A. Ed Malley.

Q. The sheriff? A. Yes.

Q. How long did you talk in the office?

A. Just a few minutes; then I asked him if he knew some place I could get a sandwich there in town, and he said, "Over there," and I told him I guessed I would go over and get one, and he invited me to come back after I got through eating, but I didn't go back to the office.

Q. Did you have any further conversation with

(Testimony of William C. McGarry.)

him at the time other than you have described?

A. No.

Q. When was the next time after that when you saw him?

A. The next time I saw him was when I went down and brought the pump-man out, and the pump-man acknowledged before the superintendent and myself—

Mr. BROWN.—One moment! I object; let him state what the pump-man said.

Mr. SANDERS.—(Q.) What did the pump-man say?

A. The pump-man said he told this man it was rain-water, and he thought it was rain-water.

Q. Was that all that was said by the pump-man, Billy? A. Yes.

Q. What did the superintendent say?

A. The superintendent says, "He doesn't know what he is talking about."

The COURT.—(Q.) What man was that he told?

A. The herder.

Mr. SANDERS.—(Q.) Now, where was that pump-house, or was there a [63] pump-house there?

A. Yes, there was a little pump-house about, oh, fifty or sixty feet from where this water was in the road.

Q. Where was it that you had the conversation you have described?

A. It was pretty near in front of the pump-house;

(Testimony of William C. McGarry.)

he came out of the pump-house, I believe, right at the time.

Q. Where was the herder at that time?

A. He was down with the sheep, right below there.

Q. Then there was no one present at that conversation except the pump-man, the superintendent and yourself?

A. No; I called Pete up and asked Pete if this pump-man didn't tell him it was rain-water, and he said, "Yes," and the pump-man says, "I did tell him it was rain-water, and I thought it was rain-water," and there was two other fellows there, one of these fellows that I put to work.

Q. I would like to get that man's name, or what kind of looking fellow he was; what kind of looking man was he?

A. We were talking to him there in Millers, a stout young fellow; he and Riley, Riley was the other man.

Q. You say that you sent a telegram to Reno, who did you sent it to?

A. C. S. Wheeler; I sent one to Mr. Wheeler and one to Mr. Holcomb both.

Q. I hand you a paper and ask you to examine it, and state whether or not you can recall whether that was the telegram that you sent to Mr. Holcomb?

A. Yes, that is the telegram.

Q. What time was it that these sheep got into this water? A. Just about five minutes after twelve.

Q. About five minutes after twelve? A. Yes.

(Testimony of William C. McGarry.)

Mr. SANDERS.—I would like to read this telegram into the record.

The COURT.—Is there any objection?

Mr. BROWN.—No objection.

[64] Mr. SANDERS. — (Reading:) “Millers, Nevada, February 5, 1914. George Holcomb, Reno, Nevada. Come to Millers to-night. Sheep got poisoned water. Have all witnesses. Answer. W. C. McGarry.” 1:10 P. M. and 1:14 P. M. is marked on it.

Q. Now, did you send any other telegram?

A. Yes, I had a telegram from Mr. Carl Wheeler then, saying either he or Mr. Holcomb would come that night, and to wire all particulars.

Q. Did you wire particulars? A. Yes, sir.

Q. Examine that and state if that is the wire. (Hands to witness.) A. That is the telegram.

Mr. SANDERS.—We offer it.

Mr. BROWN.—We object to the offered testimony. The wire, after reciting certain facts, says, “They have assumed responsibility.” In the first place, we object to it as a self-serving declaration, and in the second place as the assumption of the witness.

Mr. SUMMERFIELD.—I would suggest, if the Court please, that the objection is not well taken in this point of view, that it constitutes a part of the *res gesta*; as to what was done, of course, the contents themselves could not bind the defendant company, we do not claim that.

Mr. SANDERS.—I consider that as immaterial,

(Testimony of William C. McGarry.)

if your Honor please, also. The main point, if your Honor would see the telegram, is, as my associate says, that it is part of the *res gesta*,—what this man did and how it was done. It is not offered for the purpose of showing that the company had assumed any responsibility, because the suit here shows that they have, as far as that is concerned.

Mr. BROWN.—If the Court please, it is dated five o'clock; I do not see how it could be part of the *res gesta* under the rule, and [65] furthermore, it does not appear that there was any person at Millers in any way connected with the situation that had power and authority.

The COURT.—I would not accept that as proof of that fact, and I do not see that it is a matter of any importance unless it can be received for that purpose.

Mr. SANDERS.—(After discussion.) I will withdraw the offer. It was only as to the good faith of the witness that I wanted to put it in, to show that he was doing all he could; that was the only purpose of referring to it.

Q. Now, when you had this conversation, did you have any further connection with the sheep, either those dead or alive?

A. I had no further connection with them down there.

Q. At Millers?

A. No; till they were brought over to the camp that night; Mr. Heydenfelt sent some men over there with some of the sheep, the ones that were alive; I

(Testimony of William C. McGarry.)

sent Pete out, and we took them out that night; Mr. Heydenfelt sent some others over that he had saved.

The COURT.—I didn't hear what you said.

A. Mr. Heydenfelt that night sent a couple of men over with sixty or seventy that he had saved, that he got out of the water and had saved.

Q. Mr. SANDERS.—Those that had recovered from the effects of the water, sixty or seventy?

A. I should judge sixty or seventy that he sent over.

Q. And that was about what time?

A. Along just before dark.

Q. What was done after that, Mr. McGarry, by you?

A. He said he was going to keep some men down there that night to watch them, and he had a few in a little corral down there, some [66] that were not able to walk yet; he had a few in that little corral down there, and he said he was going to keep a man down there to watch them.

Q. And he was doing all he could to save those that were partially affected, from death? A. Yes.

Q. What was done with the live ones?

A. They were sent back over to where we camped, and held there until the next morning, when Mr. Wheeler and Mr. Holcomb got in.

Q. Did both Mr. Wheeler and Mr. Holcomb come?

A. Yes.

Q. What was next done by you with reference to this?

(Testimony of William C. McGarry.)

A Why, they walked down there with me, and looked the situation over, and we were just coming back when we met the superintendent, I introduced Mr. Wheeler and Mr. Holcomb to him, and we went on up to his office.

Q. Now, when did you leave Millers on your way to the Rawhide vicinity with the remainder of the sheep? A. On the 7th.

Q. What road did you take to get out of Millers?

A. Right down through where they were poisoned.

The COURT.—I didn't hear.

A. Right through where the sheep were poisoned.

Mr. SANDERS.—(Q.) Did you travel that road with your wagon and the remainder of the sheep, too?

A. Yes; well, the sheep were out a little ways.

Q. I am not clear as to the position that your camp was in; you say the sheep were brought back to the camp; was that across the track on the south side?

A. Across the track.

Q. Did you bring those sheep over the track in the same way you took them the day before that?

A. Yes, sir.

Q. And brought them back up to this road at the same point?

A. Well, no, we didn't come back in there where the dead sheep [67] were then; we kept further out in the valley with the sheep.

Q. Circled around? A. Yes.

Q. And you travelled the road with your wagon?

(Testimony of William C. McGarry.)

A. With my wagon.

Q. Came right through the town with your wagon?

A. Yes.

Q. Were there any other roads there than the one that you travelled? A. I didn't see any.

Q. Was it a well and frequently travelled road, do you know?

A. Why, there was travel on it, it seemed pretty well travelled, yes; light rigs, looked like light rigs and automobiles.

Q. Cut up any? A. Some.

Q. What was the condition of the weather at that time?

A. Why the weather was nice, good and cool, freezing a little at nights.

Q. Were there any other points than at this point where the sheep got into this water, where the ground was covered with water? A. I didn't see any.

Q. Did you inspect the ground below that, and on the east side of the road? A. Yes.

Q. And you found none? A. Found what?

Q. Found no water?

A. No water in there close at all, outside of that one pond.

Q. And this is the pond,—suppose this was the pond, this point here on this map (indicating).

A. That is supposed to be the pond there, is it?

Q. Yes. A. Yes, sir, that is the pond.

The COURT.—You are pointing between the two.

Mr. SANDERS.—I mean to point here (indicates).

(Testimony of William C. McGarry.)

The COURT.—That is at point “1.”

Mr. SANDERS.—At point “1,” yes, sir.

[68] Q. Assuming this to be the dry lake, and this the road, now, what water was there there?

A. There was just the water that was in the dry lake and the road.

The COURT.—(Q.) The only water there then was the water that you found at point “1”?

Mr. SANDERS.—Yes, sir.

Q. Now, about how much territory did that water cover?

A. Oh, I should judge about twice the space of this room, not quite twice.

Q. On both sides of the road, was it?

A. Yes, sir.

Q. How deep was it?

A. Oh, two or three or four inches.

Q. How was it with reference to the ruts of the road, were they filled with water, or how were they? A. Yes.

Q. And the water was two or three or four inches deep within a radius of how much?

A. Oh, not quite twice the size of this room—larger than the size of this room, though.

Q. How many sheep were there in this band?

A. I could not say exactly how many.

Q. How many were killed?

A. There was something over ten hundred.

Q. Something over ten hundred; can you give the exact number? A. No, I could not.

(Testimony of William C. McGarry.)

Q. Did you endeavor to count them there on that occasion?

A. I helped mark them, and Mr. Wheeler and Mr. Holcomb were getting count of them.

Q. They did the figuring? A. Yes.

Q. How many were there when you started out?

A. 1565, I believe—now, I am not sure about that.

Q. That is the number you were supposed to arrive at Miller's with, 1565?

A. Yes; I would not say now whether that was the number [69] or not; it seems to me it is.

Q. Did you count the live ones remaining after that? A. Mr. Wheeler counted them.

Mr. SANDERS.—That is all.

Cross-examination.

Mr. BROWN.—(Q.) You sold the sheep before you started north from Springdale? A. Yes, sir.

Q. What price did you receive?

A. We bunched the lot.

Q. How much?

A. Sixty-five hundred and some odd dollars.

Q. Paid by check? A. Yes, sir.

Q. A firm known as Kimball and McGarry?

A. Yes.

Q. How long had you been in partnership?

A. Oh, we had been in the sheep about eighteen months.

Q. When did you go into the Rhyolite country?

A. In 1904.

Q. You were one of the pioneers in that district,

(Testimony of William C. McGarry.)

were you? A. Yes.

Q. You and your brother? A. Yes, sir.

Q. You were engaged in mining there?

A. Yes, sir.

Q. At some of the pioneer properties?

A. Yes, sir.

Q. Formed some of the Pioneer corporations there? A. Yes, sir.

Q. And were actively engaged in mining in Bullfrog for how many years after that?

A. Oh, four years, anyway, or five years.

Q. You had had some mining experience before you went there? A. Not very much.

Q. Have you had any since you left there?

A. No.

Mr. SANDERS.—I forgot to ask one question in direct.

Mr. BROWN.—Go ahead.

By Mr. SANDERS.—(Q.) Mr. McGarry, had you ever been to the town of Millers before, in that vicinity?

A. Just on the train; just [70] going through there on the train.

Q. Had you ever been in the vicinity, or traveled that road out to Crow's Springs, and over to Rawhide? A. No, sir, never in my life until that trip.

Q. You say that you passed the road that led you by the Consolidated Reduction plant, did you make any inquiries or get any directions there?

A. I knew that well, I had been through there so many times.

(Testimony of William C. McGarry.)

Mr. SANDERS.—That is all.

By Mr. BROWN.—(Q.) Did you live in Tonopah before you went to the Bullfrog country?

A. Yes, sir.

Q. How long did you live there? A. A year.

Q. Did you live there after you left the Bullfrog country? A. Not to speak of, no, sir.

Q. You have been in and out of Tonopah a great deal? A. Yes.

Q. And Goldfield? A. Yes.

Q. Familiar with mining conditions in both those districts? A. Yes, sir.

Q. Mining was primarily your business and activity during the years that you were in Tonopah and in the Rhyolite country, wasn't it?

A. Not in Tonopah; I never done any mining in Tonopah.

Q. In Rhyolite? A. Yes.

Q. You knew of the mills at Tonopah?

A. I know where they are, where they are situated, most of them.

Q. You knew of the mills in Millers; you knew there were two mills there?

A. I knew there were mills there; I didn't know how many.

Q. How did you come to ask Acree about the cyanide?

A. I didn't ask him about the cyanide; I asked him about the water; he just happened to be the man that was there on the porch.

(Testimony of William C. McGarry.)

[71] Q. You could see the water down there, could you?

A. Yes, sir, from the corner of Mr. Dale's store.

Q. Now, what did you ask him?

A. I asked him if that was cyanide water down there, and he said no, that was rain-water, that the cyanide water was all further back, that it was in ponds.

Q. What prompted you to ask him if that was cyanide water?

A. The minute I drove in this man came up there to the camp, and said there was cyanide water, to be careful—the man that wanted to buy the mutton; and I knew there was mills there in Millers, and I was looking out for cyanide water if there was any there.

Q. You were looking out for cyanide water?

A. I didn't want to run into it if there was any there.

Q. And the man that came with his wife to buy mutton told you to look out for cyanide water?

A. He came alone; he came with his wife that night.

Q. And he told you to look out for cyanide water?

A. Yes.

Q. And you knew from what he said there might be cyanide in the water around that country.

A. I didn't know from what he said, because Mr. Acree told me that the cyanide water was all impounded.

(Testimony of William C. McGarry.)

Q. Now, state fully again the whole conversation which you had with Mr. Acree.

A. I just drove in there and Mr. Acree was on the porch, and I met him and we got to talking about Rhyolite, and he said he had been down there, and he was down there the time Malley lost his arm, was with him in the auto that day, and just got to talking generally; and he asked me about the sheep, and I walked out to him, and I said, "Is that cyanide water down there?" and he said, "No, that is rain-water, the cyanide water is all further back, the cyanide water is all impounded," those are the very words Acree [72] told me, and I took his word for it; I knew him and I think he is a pretty nice fellow.

Q. Anything further said about water?

A. No, nothing with Acree at all; and I asked Acree where to get the next water, and he said Peavine Creek ought to be running, and that I would get lots of water at Crow's Springs.

Q. Did Acree say anything to you at that time and place about keeping on the south side of the track to be safe about the matter of cyanide? A. No.

Q. Didn't he caution you to keep on the south side of the track? A. No, sir.

Q. And when he spoke of the water you have described as the rain-water, didn't he say, "You never can tell about cyanide," that it would be safer to keep on the south side of the track?

A. I don't remember that conversation at all; I

(Testimony of William C. McGarry.)

have no recollection of it.

Q. And in that same conversation at that time, didn't he advise you to go south of the track to a lake beyond, where he said he had hunted ducks, and where he knew that the water would be safe, because the ducks couldn't live there if there were cyanide in it, and that you could get water there, and that it would be good water, and that you could then strike from there over to Crow's Springs?

A. I don't remember any such conversation as that at all. Mr. Acree did tell me about the lake down there, and he said it was a whole lot further around that lake, and the Crow Springs was my nearest route, and if I went by that lake, I could not come back and strike in where the mill was; there was no possible chance to go that way unless I went the same way I did, right by Millers; if I did go that way I would have to go seventy miles without water.

[73] Q. Now, the water that the sheep drank was the only water around that immediate vicinity, was it?

A. Yes, sir, that was the only water that we could find.

Q. Now, when the man who came to buy mutton told you to look out for cyanide water in that country, what water did he have reference to?

A. Down at the mills, I suppose—pointed to it and told me where the mills were, and he also said the cyanide water was impounded. I had no conversation with him at all about this pond that I had

(Testimony of William C. McGarry.)

the conversation with Mr. Acree about, none at all with him.

Q. Well, the sheep could not get into the mill or over the dam around the ponds, and get the mill water that way, could they?

A. Not unless they were run right in there.

Q. It would not be possible for the sheep to climb up and scale over those dams, would it, and get the water?

A. Some of the dams I saw there they could go over them very easily, especially those outside of the fence there, where the old fence was, where the posts are very near covered up, sheep would go over that easy.

Q. Do you remember talking in Millers with a man by the name of Floathe? A. Floathe?

Q. Floathe, a tall heavy-set man with light hair.

A. Has he got something to do with one of the reduction plants there?

Q. He is a leaser on one of the tailings ponds of the Belmont Company; he sweeps the surface of the pond for the values that are raised to the surface by the operation of the sun.

A. I know who the man is, I have met him; the first place I ever met him was in Tonopah.

Q. Did that man tell you to be very careful, and no to go on the [74] north side of the track, that the sheep would be liable to get into the cyanide, and that it would kill them all off?

A. No, sir, he never did; if I had had half of the

(Testimony of William C. McGarry.)

warning I was supposed to have got I would not have been anywheres near Millers. Do you suppose if half of these men had told me that I would have to keep away from there, do you suppose if every man in town had come up and told me that, I would go down there with the sheep? I would have been an awful fool if I did, to have every man come up and tell me it was cyanide water, and then go right down there to it.

Q. Now, you mentioned cyanide in your conversation with Acree and with the man who came to buy sheep?

A. The man who came to buy the sheep mentioned the cyanide to me first.

Q. Yes. Did you mention cyanide to any other person while you were in Millers?

A. I don't know of anybody else that I did; I might have; I am not saying that I didn't. Of course, I was looking out for cyanide water, if it was there I wanted to know it.

Q. Did any person else besides those two men mention it to you? A. Not that I remember of.

Q. What is your best recollection on that point?

A. I don't remember of anybody else telling me about it at all, unless there might have been one big sandy-faced fellow there—I don't know what his name was—he gave me a magazine to take and read on the road, and he was telling me about the feed there; I might have had some conversation with him about the water.

(Testimony of William C. McGarry.)

Q. Do you remember a big, heavy-set, sandy fellow by the name of McNaughten, with a moustache?

A. I don't remember about him.

Q. And did you on or about February 4th have a conversation with him by the Turf Saloon at Millers, and in his presence did you state to any person there that you would like to stay around Millers [75] a while, for about a week, but you were afraid of the cyanide solution around the town?

A. No, sir, I never told a man in Millers that I would like to stay around Millers about a week; I might have said I would like to stay around there a day or two, but I never told a man in Millers I would like to stay around there a week, or that I was afraid of the cyanide solution in the town.

Q. Did you say to any man that you would like to stay around there a while if it was not for the cyanide solution around the town?

A. No, I didn't say anything about the cyanide solution; I may have stated I would like to stay a day or two, that the feed was pretty good; but I didn't state I would like to stay around there but I was afraid of the cyanide solution, or I would not have been there then.

Q. Now, after the inquiries that you had made, and after the information that had been given you, you ordered your herder to take the sheep down to this pool of water in question and give them water, didn't you?

A. I told him that there was water down there.

(Testimony of William C. McGarry.)

Q. And you ordered him to go down there and water the sheep? A. Yes, sir.

Q. Did you know how close that water was to the tailings pond?

A. Why, I had some idea; I didn't go right over to the tailings pond; but I certainly had no idea in the world that it was cyanide water right in the road; I saw teams come in on that road myself when I was in Millers, and it is the road that goes to Crow's Springs.

Q. How often did you water the sheep on the trip from Springdale north?

A. Well, we watered them the day we left Springdale, and it rained that night, rained all the next day, and we didn't need any water; and then we watered them again when we got into the [76] dry lake below Cupright, and from Cupright we had snow all through the Goldfield Hills; in the Goldfield Hills where we watered at McClain's Siding; from McClain's Siding, Millers was the next place.

Q. How often should sheep have water?

A. Well, I suppose they had ought to have it as often as they could get it, but I have run those sheep six days without water, not only once, but several times; six days is too long, but they can go that all right.

Q. When was the last time they had water before they got into the cyanide pools?

A. Right at McClain's Siding, where we broke the ice.

Q. What was that date that you watered them at

(Testimony of William C. McGarry.)

McClain's? A. The 3d, about noon.

Q. From the 3d to the 4th where did the sheep move? A. From there down to Millers.

Q. Did you make that movement in one day?

A. A little over one day; we moved on about a mile that night, after we watered.

Q. On what day did you reach Millers?

A. I got in there on the 4th.

Q. What time on the 4th?

A. About twelve o'clock I got in there.

Q. How far from the postoffice did you camp?

A. Well, I should say it was between a quarter and a half a mile out of the other side of the tracks there; I don't suppose it is over a half a mile; I believe it is a half a mile.

Q. You selected that because there was feed there?

A. Yes, a good place out there.

Q. And the sheep were there twenty-four hours?

A. Yes, just about twenty-four hours.

[77] Q. Were the sheep fed or grazed there for twenty-four hours?

A. Not right around there; the sheep didn't get into Millers until two o'clock in the afternoon, and from two to five it is not very long to graze—three hours—and the next morning; the sheep didn't graze there over five or six or seven hours at the most.

Q. Partly on the 4th and partly on the fifth?

A. Yes.

Q. And Pete Lamont herded them while they were grazing? A. Yes, sir.

Mr. BROWN.—I think that is all.

[Testimony of J. B. Talbott, for Plaintiff.]

[78] Mr. J. B. TALBOTT, called as a witness on behalf of plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. SUMMERFIELD.

Q. What is your name? A. J. B. Talbott.

Q. Where do you live? A. Reno, Nevada.

Q. What business are you engaged in?

A. Sheep raising.

Q. How long have you been engaged in that business? A. All my life.

Q. In this State?

A. I have been about thirty years in this State.

Q. I will ask you to state, if you are able so to do, Mr. Talbott, about what was the market price or value of grade merino ewes at Millers, Nevada, or in that vicinity, in February of the present year?

A. Of the present year?

Q. Yes.

A. I would say about six and a half, for good ewes.

Q. And what were lambs worth at that time, Mr. Talbott?

A. I understood you to say it was this year?

Q. Yes, February of this year.

A. Of this year?

Q. Yes.

A. What were lambs worth at that time?

Q. Coming yearlings. A. Coming yearlings?

Q. Yes.

A. Well, with the wool on, I should say about four or four and a half.

(Testimony of J. B. Talbott.)

Mr. SUMMERFIELD.—You may cross-examine.

[79] Cross-examination.

Mr. BROWN.—(Q.) Are you an officer of the plaintiff corporation? A. Sir?

Q. Are you an officer of the Sierra Land and Live-stock Company? A. No, sir, independent.

Q. Is not \$6.50 per head a little bit stiff, is not that a pretty high figure?

A. I would not rate it so for good ewes.

Q. Do you know of any sales that were made in February, 1914?

A. No, I don't call to mind any sales made at that time.

Q. Any in January?

A. I ain't positive, but I think that three or four different men from Reno went in together and bought a band of sheep in the neighborhood of Mason Valley for \$6.50 in February.

Q. Do you know of any in March, 1914?

A. No, I don't call to mind any in March.

Q. What is the lowest price per head that you know of being paid for sheep during the first three months of 1914?

A. Well, I really could not call to mind any sale at that time of ewes.

Q. Do you know of a sale of any kind of sheep?

A. No, nothing but mutton sheep around the country to butchers.

Q. How much?

A. Well, wethers usually run at \$5.00 and \$6.00 a head.

(Testimony of J. B. Talbott.)

The COURT.—About five?

A. Five to six, yes, sir.

Mr. SUMMERFIELD.—That is wethers?

Mr. SANDERS.—Yes.

WITNESS.—And old ewes at from four to four and a half; what I term “old ewes” is ewes considered too old for breeding purposes, and put on the market for mutton sheep.

[80] Mr. BROWN.—(Q.) Do you know of any actual sales made the first three months of 1914 at those figures?

A. Well, no, I really cannot call to mind any sales, but that was about the ruling price at that time, I am quite positive.

Q. Now, take the general run of a band of sheep purchased in southern Nye County, a whole band of sheep would have different qualities of sheep, would it not, sheep that ranged at a different price?

A. Yes, sir.

Q. Take a band of sixteen hundred sheep in southern Nye County last February, and if you were negotiating to purchase, what would you say was the value of them per head?

A. What time of year?

Q. February, 1914—well, say late in January.

A. Well, what were they—mixed stock, lambs and breeding ewes, and so forth?

Q. Well, it would be a little early for lambs, would it not?

A. No, the year before lambs, what would be coming yearlings is what I mean.

(Testimony of J. B. Talbott.)

Q. Assuming there were a fair proportion of lambs among the flock.

A. That would depend altogether on how many of the proportion of the mixture would be lambs; the lambs would have their set value, and the ewe sheep would have a different value.

Q. What would be an average proportion; how many lambs would you usually expect to find in a band of that kind?

A. Well, there would be no ratio set by that, because you can't tell how many there would be that year of the previous raising; that would not hardly be a fair criterion to go by.

The COURT.—Do you know the proportion of this band of sheep?

Mr. SUMMERFIELD.—Yes, we know the exact numbers.

The COURT.—I don't want to interfere with your examination, [81] but if you can, I would like you to furnish Mr. Brown with that information, and I would like to have Mr. Talbott questioned on that.

Mr. SUMMERFIELD.—1270 ewes and 380 lambs and 15 bucks.

WITNESS.—Well, I would say the yearlings were worth four to four and a half with the wool on; and the ewes six dollars, or better; and the bucks according to what the quality was; we would not get them around Reno for less than probably fifteen dollars a head, is what we usually pay; that is what I have to pay; it seems to be about a standard price for them.

(Testimony of J. B. Talbott.)

The COURT.—That can be considered as my question, if you wish.

Mr. BROWN.—Yes, I will be very glad to.

Q. Now, if that band of sheep were sold for \$6,500, what would you say the ewes were worth, about, per head? A. I would not have an idea on that.

Mr. SUMMERFIELD.—I object, if your Honor please, on the ground any answer responsive to the question propounded is incompetent as tending, if it has any legal tendency at all, to establish a false measure or standard of value. What anyone pays for a specific piece of property in the event of its loss through the negligence of anyone, if it be lost through the negligence of another, has no materiality whatever. The question is, what was the value at the place at the time of the loss. If your Honor thinks it is material I don't know that I shall strenuously object to it, but I think it is incompetent.

Mr. BROWN.—I will withdraw it.

Q. What was the lowest price that you paid for ewes in 1914?

Mr. SUMMERFIELD.—I object to that, if your Honor please, upon the ground that any answer responsive to the question is entirely too remote to the facts of this case. What he might have paid for [82] them at the same place, and what kind they were, are elements that would enter very largely into the price.

The COURT.—Well, I don't suppose there is any possibility of any of the witnesses being able to tes-

(Testimony of J. B. Talbott.)

tify to sales of sheep in that vicinity, except this one sale for \$6,500, and the witness knows nothing about that, I presume; but on cross-examination I think counsel has a right to go into those matters, and ask about individual sales, and the prices the witness has given, in order to test his judgment on values. I will allow the question.

Mr. SUMMERFIELD.—I ask for the benefit of an exception, if the Court please, on the ground that any answer responsive to the question would be based upon assumptions broader than any possible issue that could be involved in this case.

(By direction the reporter reads the last question.)

A. Five dollars a head.

Mr. BROWN.—(Q). How many sheep did you buy at that figure? A. I bought a thousand ewes.

Q. Did you buy any at a higher figure?

A. No, I didn't buy many sheep that year—let me see, no that is all I bought that year.

The COURT.—That is the present year.

WITNESS.—This year?

Mr. BROWN.—Yes, 1914.

A. Oh, I paid five and a half for what I bought this year; that is, they cost me a little over five and a half at Reno.

Mr. BROWN.—That is all.

Mr. SANDERS.—(Q.) How many?

A. Twelve hundred head.

The COURT.—That other answer may go out. The witness was asked what was the lowest price paid

(Testimony of J. B. Talbott.)

for ewes in 1914; his answer was he bought a thousand ewes and paid four and a half for them; I [83] understand this last answer is a correction of that.

WITNESS.—Yes.

Q. That you bought twelve hundred head which cost you a little over five and a half in Reno?

A. Five and a half.

Mr. BROWN.—Just one question. (Q.) When did you buy the five-dollar ewes?

A. Two years ago.

Mr. SUMMERFIELD.—(Q.) At what time did you buy those in the present year that you paid five and a half for? A. About a month ago.

Q. About a month ago? A. Yes, sir.

Q. Would there be any difference in the price of ewes in the same general section of country in February and a month ago, which would be October?

A. Oh, yes; we consider in the sheep business that ewes advance from this time on, right along.

Q. When would they be worth the most, in February or October?

A. Oh, in February, getting nearer our harvest or crop time, and the additional expense on them.

Q. And nearer lambing season?

A. Well, certainly, the crop time.

Q. And what about shearing?

A. Well, all this comes in, shearing and lambing expense.

Q. What would you, in your judgment, and basing your answer to this question upon your experience as a sheepman in this section of the country, say

(Testimony of J. B. Talbott.)

would be the difference in value of breeding ewes in February and in October?

A. What would be the difference in value?

Q. Yes. A. About a dollar a head.

Q. About a dollar a head difference?

A. Yes, sir.

Mr. SUMMERFIELD.—That is all, I think.

Mr. BROWN.—That is all.

(An adjournment is taken at this time until tomorrow, November 17th, 1914, at 10 o'clock A. M.)

[84] Friday, November 17th, 1914.

Court convened, 10 A. M.

[Testimony of Peter Lamont, for Plaintiff.]

Mr. PETER LAMONT, called as a witness on behalf of plaintiff, after being sworn through the Interpreter (Mr. Andrew Robert having been sworn to interpret the testimony of the witness, a Frenchman), testified as follows:

Direct Examination by Mr. SANDERS.

Q. What is your business?

A. He is a miner, he say; sheep-herder, too.

Q. How long have you been herding sheep?

A. Ten years, he say.

Q. Have you ever herded any sheep for McGarry and Kimball? A. He had been working for them.

Q. How long ago? A. Six months.

Q. Have you ever assisted in bringing any sheep from Springdale over to Rawhide?

A. He said he took the sheep from the ranch to Rawhide.

(Testimony of Peter Lamont.)

Q. Who was with you, if anyone?

A. It was his boss.

Q. Do you remember his name? A. McGarry.

Q. How long did you work for McGarry before you took the sheep from Springdale?

A. About seven or seven months and a half.

Q. When they left Springdale, do you remember how long it took you to get to a place called Millers?

A. About twenty days.

Q. About how far from Millers, if you know, and if you don't know you need not say—about how far from Millers did you camp the night before you reached Millers; the night before you got to Millers, where did you camp, how far? A. He say no.

Q. You don't know?

A. He say no, he don't know; he say he didn't went to Millers before he got there with the sheep.

Q. Where did you and the sheep stay the night before?

A. He say it was near the camp the night before.

[85] The COURT.—I didn't understand, Mr. Roberts.

The INTERPRETER.—He say near the camp the night before.

Q. That camp the night before?

The INTERPRETER.—He say he was near of the camp the night before.

Mr. SANDERS.—(Q.) Now, how far from Millers?

A. He said about from one-quarter to half a mile; he don't know exactly.

(Testimony of Peter Lamont.)

Q. Now, what time did you get to that camp?

The COURT.—Did you ask him a few minutes ago how far it was from Springdale to Millers?

Mr. SANDERS.—No, sir; I asked him how many days, how long was he travelling from Springdale.

The INTERPRETER.—He say about twenty days; he say it is very far, but he don't know exactly.

Mr. SANDERS.—I asked him how far it was that he camped the night before he got to Millers. Make that clear to him, because he seems to be confused as to that question.

The INTERPRETER.—He says about a quarter of a mile the night before.

The COURT.—How much?

The INTERPRETER.—A quarter of a mile.

The WITNESS.—Closer to Tonopah—closer to road.

The COURT.—I don't understand, now. A quarter of a mile from Millers, he has already said a quarter to a half a mile.

The INTERPRETER.—He say he don't know exactly.

The COURT.—What you are trying to find out is how far he traveled the day before?

Mr. SANDERS.—The day before.

The INTERPRETER.—He say he don't know exactly; he say it may be [86] four or five miles.

Mr. SANDERS.—(Q.) Do you remember the time of day that you got to the camp at Millers?

A. He say it is about—it was one hour before six, about five o'clock.

(Testimony of Peter Lamont.)

Q. Who was there when you got there, who was at the camp?

A. He said it was nobody except him; he had his boss, and nobody else, with a wagon, you know, and tent.

Q. When did you leave camp, that camp, with the sheep?

A. He left about seven o'clock in the morning.

Q. Did anyone tell you to go?

A. That was his boss told him to go.

Q. Do you remember where the boss told you to go, and what to do?

A. He told me to get some water for the sheep.

Q. Where did you take the sheep from the camp to get water; where did you take them—which way did you take them?

A. He say he went down and passed over the track.

Q. When you passed over the track, was it below the box-cars, or below the switch, at that point?

A. It was the side of the cars.

Q. The siding?

A. The side of the cars, he say.

Q. Now, when the sheep crossed the track; what direction did they take?

A. He say they stopped there till his boss come in.

The COURT.—That is, stopped at the track?

The INTERPRETER.—Yes, on the side of the track till the boss come in.

Mr. SANDERS.—(Q.) What time did your boss come? A. Between eight and nine o'clock.

(Testimony of Peter Lamont.)

Q. When he came, what did he tell you, if anything?

A. He told him to go and get some water for the sheep in that [87] little lake.

Q. It was a little lake?

A. Yes, on the road to the lake.

Q. How is that?

A. He say there was some water in the road.

Q. Where did he say to take the sheep—to take the sheep where on the road?

A. To go and water the sheep.

Q. Was there anything said where to go after you returned?

A. He say very soon they drink any water they die right there.

Q. As soon as they drank the water they died right there. Were they driven to the water, or did they just go up there, just like they smelled it, or something of that kind?

Mr. BROWN.—One moment, if the Court please. We object to that on the ground the witness McGarry already has testified that he sent this witness directly to that specific water for a specific purpose, to water the sheep. If this is an attempt to impeach their own witness on that particular point, it would be improper on that ground.

Mr. SANDERS.—No, it is more to corroborate McGarry's testimony I had in mind than anything else. He has stated that McGarry told him to take them over to the water, to the water in the road; now I wanted to follow these sheep from the track up to

(Testimony of Peter Lamont.)

where they crossed the road.

Mr. BROWN.—There is a suggestion that the sheep went to this water because they smelled it.

The COURT.—I will allow the question. I suppose it is really to assist the witness; under the circumstances, it is not exactly a leading question.

(By direction the reporter reads the question.)

Mr. SANDERS.—I will withdraw that question, and put it this way: How did the sheep get up to the road where the water was; did you drive them with the dog, or did they go after their own way?

[88] The INTERPRETER.—He say after they smelled the water he tried to stop them, and the sheep would push him, you know, and push him in the water.

Q. That is after they got up to the water?

A. Well, a little before they got to the water.

Q. How far was he ahead of them?

A. He say he was very near them.

Q. When you got up there ahead of the sheep, did you see anybody standing there about the place where they drank?

A. He say, yes; he see there was one man between the water and a house.

Q. And a house?

A. Between the water and a house.

Q. What kind of a looking man was he?

A. He say he was a big man, looks to him about fifty years of age.

Q. Did he have any whiskers or moustache?

(Testimony of Peter Lamont.)

A. He thinks so, that he had a moustache.

Q. Did you talk to him?

A. He say, yes; he ask him if he could give drink to the sheep; he say he told him that it was raining-water on the road.

The COURT.—It was “raining-water” in the road? A. Yes.

Mr. BROWN.—I move to strike that out as not responsive to the question. (The reporter reads the question.)

Mr. BROWN.—I withdraw that.

The INTERPRETER.—He say it was—that he thought it was rain-water in the road.

Mr. SANDERS.—(Q.) Did he say anything more than that?

A. He say after the sheep fell dead, he helped to bring the sheep back; after the first sheep fell dead, that fellow helped him to bring the sheep back.

[89] Q. What kind of a house was this?

A. He said a small house.

Q. Did you notice at that time, or since that time, what was called the pump-house there at that point?

A. He says he didn't have time to see if it was a pump.

Q. How far from the house was this man when he was talking to you about the water?

A. He was near of the house.

Q. What did he seem to be doing there?

A. He say he don't know, only he was doing nothing at the time he was there.

Q. What time of day was this?

(Testimony of Peter Lamont.)

A. About half past nine or ten.

Q. Did you see McGarry there?

A. He say him before they went to the water with the sheep.

Q. How long after the sheep got into the water did you see McGarry?

A. He said he sent by the pump-man, and he come back right away, in a few minutes, he say.

The COURT.—You say he sent word by the pump-man?

A. Yes, to send for the boss, you know; he said he come back in ten minutes, as quick as he could.

Mr. SANDERS.—(Q.) Now, the man that talked to you when you got up there a little ahead of the sheep, has anyone since the sheep drank the water and died told you that that man was the pump-man? Do you understand that? Has anybody told you that the man you were talking to when you got there with the sheep, was the pump-man? A. No.

Q. How do you know he was the pump-man?

A. My boss—his boss told him so.

Q. Would you recognize that man if you would see him, do you think? A. He say he think so.

Mr. SANDERS.—I would like to inquire, Mr. Brown, if the gentleman is here?

[90] Mr. BROWN.—Yes, he has described him correctly. Mr. Los Kamp, his name is.

Mr. SANDERS.—Q. When the sheep fell like you say they did—died—and the pump-man went for the boss, what was next done, as far as you were concerned; what did you do?

(Testimony of Peter Lamont.)

A. He tried to push them back just as much as he could.

Q. Did you have any dogs with you?

A. He had one dog.

Q. Was he a pretty good one?

A. He say he was a good dog; he say if he didn't have the dog, he would not have saved one.

Q. Now, had anybody ever talked to you about this water being cyanide?

A. He say no; he say he didn't see anybody.

Q. How long had you been driving sheep before that time? A. He say seven or eight years.

Q. Have you ever had any experience like this before? A. He say no; never had bad luck before.

Q. I didn't get that.

A. He say he never had no bad luck before.

Q. Now, have you ever been with sheep around any of these mills that you see set about on the desert? A. He say no.

Q. When the sheep crossed the railroad track, and you talked to the boss about the water, did the boss, or anyone else, ever say anything to you about poison water on that side of the track?

A. He say no.

Q. Did you have any talk with people down there at Millers? A. He didn't see anybody.

Q. Did anybody ever say anything to you—you say, though, that you don't remember talking to anyone at all about the water, poison water?

A. He didn't see anybody, he say.

Q. Now, before you got up to the road, coming across

(Testimony of Peter Lamont.)

the track, [91] don't you understand, how far was it from that point up to the point where they got into this water, if you know; if you don't know, you need not say. (Witness talks to interpreter.)

Mr. SANDERS.—I would like your Honor to notice that gesticulation.

A. He said the water was not very far from the track.

Q. Not very far from the track? A. No.

Q. Did you circle around, or how did you get up there—around, and down into the desert?

A. He say he didn't went straight to the water; he always keep off the water for a while; he didn't go far from the water, only this was on the left-hand side of the water. He say that he stopped there till the boss come in before he went to the water.

Q. Before he went to the water? A. Yes.

Q. Then they went right on up to the water?

A. He say they stopped there about an hour or hour and a half.

The COURT.—I don't understand that.

Mr. SANDERS.—(Q.) When the boss told him; did they go right on up to the road where the water was, or did they circle out into the desert, and nibble around in the brush?

A. He says when his boss told him to get some water for the sheep, he went right away.

Q. Went right away. Now, how long had the sheep been without water up to that time?

A. He say pretty near two days.

Q. Pretty near two days, you say?

(Testimony of Peter Lamont.)

A. Maybe a little more; they was come in from Goldfield, and he say there was no water there.

Q. How long will sheep go without water; how long can they be driven without water?

A. He say it depends on the heat; if it is nice and cool, they stay longer.

[92] Q. Let us finish up that point about how long. I asked how long will sheep be driven before drinking water; now, what was the answer to that?

A. He say that would depend altogether on the weather, if it is very warm, you know.

Q. Like the weather was when you boys came along that road there, how long would they go without it?

A. He say that was about—it was pretty hot, and they couldn't go very much further.

Q. Do you remember about breaking the ice down there where the two tracks come together, on the way from Goldfield; do you remember anything about that?

A. Yes, he say it was a little lake from Goldfield, and they had to break the ice with a stick to give some drink to the sheep.

Q. Some drink to the sheep; that is all right. Now, if you remember, did the sheep get across the road, any of the sheep get across the road, or did they get up to the road,—get their noses in the water, or mouths in the water, and then drink—how was that; did the sheep get across the road before they drank the water?

(Testimony of Peter Lamont.)

A. Yes, he say he had to cross the track to the water.

The COURT.—Was that your question, the railroad track?

Mr. SANDERS.—No, the road. My question was, did the sheep get across the road, or did I say track?

The COURT.—No, you said road.

A. He say no.

Mr. SANDERS.—(Q.) Let me bring you back: You said that the sheep crossed the track, and the boss told you to take them to the water, and they drank it, and died; now, I ask you whether or not they had gotten clear across the road then, or did they fall right there?

A. He say they had to cross the road.

The COURT.—Did the sheep fall down before they reached the road?

[93] A. He say the water was right in the road.

Mr. SANDERS.—Q. Did the sheep die in the road?

A. He say they didn't die before they drink; as soon as they drink some water they fell dead.

Q. In the road?

A. Right in the road, he say; he says if he drink that water he would have died like the sheep.

Q. Did you see any horses drink there that morning? A. He say no.

Q. Did you talk with anyone about the water on the other side of the road?

A. He say he didn't see anybody; he say he saw only that man that was there with him.

(Testimony of Peter Lamont.)

Q. Now, did the man, or anybody else, tell you about the water up across the road next to the big pond? A. He say no.

The COURT.—What are you referring to on the map?

Mr. SANDERS.—I am referring to this territory here, your Honor (indicating on map).

Mr. SUMMERFIELD.—To the mill side of the wagon-road; the side that the mill and dam were on.

Mr. SANDERS.—(Q.) Now, Pete, if you can, tell us whether or not there was a small quantity of water, small, not a big water there?

A. He say he didn't have very much water.

The COURT.—That is, not very much water in the road.

Mr. SANDERS.—That is what I am going to bring out later; I don't understand, exactly. (Q.) Not very much water? A. No.

Q. Was it in more than one place, or was it scattered about in two or three different pools or ponds?

A. It was all in one place he say.

Q. Now was there much of it in the road?

A. The part of the water was in the road.

Q. Was there any across the road on the side that the sheep came [94] into the road on?

A. He say the water was all in the road; a little on the side, only very little.

Q. Now, Pete, look at this paper here (referring to the map on board). Now, say that was the water; that yellow is the desert, don't you see, that sand,

(Testimony of Peter Lamont.)

you know dry lake, this yellow is; this blue is water; this dead looking color is mud—supposed to be mud; here is the big sand bank up here, the dam; now, here is the road, don't you see, running right across here; now, you have testified to there being water in the road?

The WITNESS.—Yes, in the road.

Q. Now, tell me whether there was any water before you got up to the road?

The INTERPRETER.—He didn't see any.

Q. You didn't see any?

The WITNESS.—No.

Mr. BROWN.—If the Court please, I move that the interpreter be dismissed, it appearing that the witness fully understands ordinary English language.

Mr. SANDERS.—He does, and no one has ever said that he didn't. The question is to put it in terms so that he can intelligently answer the questions.

The COURT.—Well, you may try him without the interpreter for a while, if you wish.

Mr. SANDERS.—(Q.) Now, Pete, did you see the big settling pond before you got the sheep up to the road; did you notice, or was your attention ever called by any one to the big settling pond on the other side of the road where the sheep drank the water?

The WITNESS.—On the other side the road? (Witness talks to interpreter.)

The INTERPRETER.—He say he didn't see any at all there; farther off he saw a dam.

(Testimony of Peter Lamont.)

[95] Mr. SANDERS.—(Q.) Farther off he saw the dam. Now, did you notice that this water in the road came from that dam?

A. No, he say he didn't know.

Q. Did you put the sheep in the water before you talked, or the man told you about rain-water?

Mr. BROWN.—I object to that as leading.

Mr. SANDERS.—Well, I think it is leading.

Q. You stated in answer to other questions that you got up a little ahead of the sheep, talked with a man close to the house, and he said—I won't repeat the testimony; but when you talked to that man I want to know whether or not any of the sheep had gotten into the water; when you first talked to him, when you first got up there with your sheep, had any of them got into the water before he said rain-water?

A. No, he say about the same time that he ask the man that it was rain-water the sheep went right to the water.

Q. How far ahead of the sheep were you?

A. They follow him very close, some are aside of him.

Mr. SANDERS.—I think that is all.

Cross-examination.

Mr. BROWN.—(Q.) How many years' experience did you have in mining?

A. He say that he worked in a mine in France; one year in this country in a mine.

Q. In what State in this country?

A. In Monterey County, he say.

(Testimony of Peter Lamont.)

The COURT.—You can try him without an interpreter, if you wish.

Mr. BROWN.—I will proceed this way, if the Court please.

The INTERPRETER.—Monterey County, California, he say.

Q. Mr. BROWN.—In what States did you herd sheep in this country?

A. He say it was in California and Nevada.

[96] Q. Have you ever been around mills in Nevada? A. He say no.

Q. Do you know that cyanide is a poison?

A. He say no, he never saw any.

The COURT.—(Q.) He never saw any?

The INTERPRETER.—That is what he say.

Mr. BROWN.—(Q.) Why did you ask the pump-man if that was rain-water?

A. He asked him because he didn't know if the water—he thought that the water belonged to him, you see, so he gave attention to how these sheep drinks that water.

Q. If the water was on a road, would it belong to the pump-man?

A. He say he don't know, he had to ask him. He say he thought that was rain-water in the road.

Mr. BROWN.—I move to strike it out as not responsive to the question.

The COURT.—It may go out.

Mr. BROWN.—(Q.) If these had been your own sheep, would you have watered them there?

A. He say yes, sure.

(Testimony of Peter Lamont.)

Q. On the way down to the water from the sheep camp, did you meet any person?

A. No; he say no, he didn't meet anybody.

Q. Didn't talk to any person?

A. No, he says he speak only to his boss.

Q. Did you pass any house on the way from the sheep camp to water?

A. He says he saw a house in the plateau farther, only he passed on the side.

Q. How far away from the water was it?

A. Well, he don't know, exactly, he just guesses about a mile.

Q. Who did you see at that house?

A. He say he didn't see anybody.

Q. Did you see any man there?

[97] A. He didn't see nobody except a dog.

Q. A dog? A. Yes.

Q. Did you see a woman there?

A. He say he didn't look about very much; he say he didn't see any.

Q. How many dogs came out?

A. He saw a dog, he say.

Q. At that house, didn't a man come out and say, "Don't let your sheep scatter, they might get into cyanide don there"?

A. No, he say, no, he didn't see anybody.

Q. Didn't a man and a woman with some dogs come out there to keep his sheep off their place?

A. He say no, nobody tell him anything.

Q. Didn't see any person there at all except the dogs?

(Testimony of Peter Lamont.)

A. He say he didn't look out; he didn't see anybody; he saw only the dog.

Q. Is not that house about a half a mile from the water?

A. He say he ain't certain how far it was; he saw the house, only he ain't certain how far.

Q. When you first saw the pump-man, how many sheep were in the water?

Mr. SANDERS.—Wait a moment! I am going to object to that, I don't think it is a proper or a fair question. I don't think the witness has testified as Mr. Brown's question would indicate.

The COURT.—That is an assumption that there were sheep in the water, but he can ask if there were any sheep in the water when he talked with the pump-man.

Mr. BROWN.—(Q.) When you first saw the pump-man, were there any sheep in the water?

A. He said they came on the same time.

Q. Were there any sheep in the water when you saw the pump-man?

A. He say they was very near the water when he saw the pump-man.

Q. And going toward the water—were they going toward the water? [98] A. Yes, sir.

Q. And moving in a flock?

A. Yes, they was going right in a gang, in a flock.

Q. Didn't the pump-man say to you, "What are you doing here with those sheep"?

A. He say no, he didn't ask him.

Q. Didn't the pump-man immediately say to you,

(Testimony of Peter Lamont.)

“Head them off and don’t let them get in there”?

A. He say no.

Q. When you asked the pump-man if that was rain-water, didn’t he say, “It rained in there, but head off your sheep and get them back”?

A. He say no, he didn’t tell him; he say no; he say they didn’t have time, they had only one word or two and the sheep jumped into the water.

Q. Did the sheep get into the water very quick?

A. Yes, they was very, very fast.

Q. If the pump-man had said it was bad water, would you have had time to keep the sheep out of the water?

A. He say no, he would not have time.

Q. Do you know the gentleman I am pointing to on my left, Mr. Heydenfelt, the mill boss?

A. He say no.

Q. The gentleman is standing up; did you ever see him before at Millers?

A. He say he didn’t see him before the sheep dead.

Q. Did he see him after the sheep were dead?

A. He say he ain’t very sure; he thinks that he shake hands with him after that.

Q. Do you remember the mill boss bringing fifty or sixty sheep to you that night after the other sheep had been killed? A. What was your question?

Q. I will put it again. Do you remember the mill boss bringing fifty or sixty sheep into your camp the night the sheep were killed?

A. Yes, that is what he say, he say he remember that.

(Testimony of Peter Lamont.)

[99] Q. Do you remember any talk you had with the mill boss when he brought the fifty or sixty sheep to you?

A. He say that was very bad to lose the sheep that way; he told that to the boss.

Q. Did the mill boss say to you, "Why did you take your sheep down there to water, didn't you know there was cyanide in that water"?

A. He say he didn't know, nobody tell him before the sheep died.

Q. Didn't you say to the mill boss, "My boss tell me to take the sheep down there, me just like a sheep"?

A. He say he didn't see him only after the sheep died.

The COURT.—I didn't understand that.

A. He say he didn't see the mill-man before the sheep died.

Mr. SUMMERFIELD.—He don't understand the question.

Mr. BROWN.—I will put it again. (Q.) Didn't you say to the mill boss that night when he brought some sheep back to you, that the sheep boss told you to go down there for water, and you said, "Me just like sheep"? Shall I put it again, Mr. Robert?

The INTERPRETER.—Yes, only not so long.

Q. This is in answer to Mr. Heydenfelt's question; when Mr. Heydenfelt said, "Why did you take the sheep down there, didn't you know that was cyanide water"? didn't you say to the mill boss, "My sheep

(Testimony of Peter Lamont.)

boss tell me to go down there for water, I am just like a sheep?"

A. He say the boss told him to bring the sheep to the water; he say he didn't see anybody before.

Mr. SUMMERFIELD.—I don't believe he understood the question.

Mr. BROWN.—Just let it go, we have laid the foundation all right.

Q. How long have you been in this country?

A. Ten years.

Q. Do you speak English with Billy McGarry?

A. He say a very few words only, the most it was Spanish, Spanish language.

[100] Q. Have you a fair knowledge of the English language; do you understand English?

A. He say he understand a little bit, not very much.

Q. Enough to get along and attend to your business?

A. He say hardly so; he say that he understands a little better now, only he has got to learn a whole lot yet.

Q. Do you use the English language when you go into a restaurant?

A. He say he generally go to a French restaurant.

Q. No French restaurants in Nevada, are there?

A. He say he do the best he can.

Q. Do you make yourself understood when you go into a saloon?

A. He say yes, he say he call for beer.

Q. Did you have any bells on the sheep?

(Testimony of Peter Lamont.)

A. He say yes.

Mr. BROWN.—That is all.

Mr. SUMMERFIELD.—That is all.

[Testimony of W. T. Holcomb, for Plaintiff.]

[101] Mr. W. T. HOLCOMB, called as a witness on behalf of plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. SUMMERFIELD.

Q. W. T. Holcomb is your name? A. Yes, sir.

Q. Where do you live, Mr. Holcomb?

A. Close to Reno.

Q. How long have you lived in Nevada?

A. I was born here—forty-three years.

Q. Lived in the State all of your life, have you?

A. Yes.

Q. What relation do you have with the Sierra Land & Livestock Company, plaintiff in this case, Mr. Holcomb? A. I am president of the company.

Q. And Mr. Carl Wheeler, who is sitting here, is connected with that company in what capacity?

A. He was a director at one time; I forget whether he is a director at the present time or not—a stockholder, I think.

Q. What business, if any, is the Sierra Land & Livestock engaged in, Mr. Holcomb?

A. Sheep business.

Q. What, if any, familiarity have you had with the sheep business in the State of Nevada, yourself?

A. Well, I have been engaged in it practically all my life.

(Testimony of W. T. Holcomb.)

Q. And in what parts of the State?

A. Well, mostly in Washoe County; and some other business.

Q. Were you acquainted with Mr. McGarry who has testified in this case? A. Yes.

Q. How long have you known him?

A. I think the first time that I met him was on the 6th of February.

Q. What knowledge, if any, have you of this particular band of sheep, concerning which this controversy is about, and a part of which sheep are alleged to have been killed by cyanide near Millers, [102] Nevada, last February?

A. Well, the first time that I ever saw them was after they had been poisoned; that was the first time that I saw the sheep myself.

Q. Who negotiated, if you know, the purchase of those sheep? A. A brother of mine.

Q. What is his name? A. George.

Q. Is he the one that was seriously injured a few days ago? A. Yes.

Q. He is not able to be out at present, as I understand it? A. Well, no.

Q. Do you know, Mr. Holcomb, how many sheep were purchased from McGarry and Kimball?

A. 1565 head, I have the correct numbers here.

Q. Well, you can refer to your memorandum.
(Witness refers to paper.)

Q. And when were they purchased?

A. On the 21st of January.

Q. Of what year? A. Of the present year.

(Testimony of W. T. Holcomb.)

Q. What grade of sheep were they?

A. Well, they are what we call the grade merino.

Q. What was the gender and number of those sheep?

A. I do not understand the question, Mr. Summerfield.

Q. What sex were they, and in what numbers?

A. There was 1270 head of ewes, 380 lambs that were mixed, that is my understanding, were mostly ewe lambs.

Q. Mostly what?

A. Ewe lambs, the majority of them; and fifteen head of rams.

Q. The lambs were about what age?

A. Well, they were about ten months old, I should judge.

Q. What sheep-men call coming yearlings; is that what you call them? A. Yes.

[103] Who, if anyone, was employed by the plaintiff company, I mean the Sierra Land and Livestock Company, to move the sheep when they were purchased?

A. McGarry and this Frenchman, Lamont.

Q. And where to take them?

A. Well, their instructions were to drive them from where they were bought at Springdale, to Rawhide.

Q. For what purpose were they being taken to Rawhide?

A. Well, they were being taken there,—we in-

(Testimony of W. T. Holcomb.)

tended to put them into another band there, and bring them on the lambing grounds and shearing grounds.

Q. Where are your lambing and shearing grounds?

A. I have one at Pyramid Lake, and others close to Reno.

Q. What did you say the date of the purchase was, January what?

A. Twenty-first; that is the date of the check; I think that was the date, that is the day they were paid for anyway.

Q. What, if any, instructions or directions were given with reference to the rapidity with which they should be moved from the place they were purchased to Rawhide for consolidation with your other sheep?

A. Just as soon as possible.

Q. I will ask you to state to the Court, Mr. Holcomb, if you are able so to do, at about what rate of speed in driving sheep from one point to another definite point, and at the proper time of year, January and February, can they be moved with reasonable prudence and caution?

A. You mean the average distance they will travel a day?

Q. Yes, that is what I mean; I mean with reference to moving them from one point, instead of what is commonly called grazing and feeding them.

A. Well, they will travel anywhere from seven to eight or nine miles a day, I should think, at that time of the year; it depends considerably on the country

(Testimony of W. T. Holcomb.)

that they have to go [104] over too.

Q. And the character of the weather, does that have anything to do with it?

A. Oh, yes. There is one thing I want to correct, I think I said 1565.

The COURT.—1565 was what you said.

A. It is 1665.

Mr. SUMMERFIELD.—(Q.) Ewes?

A. No, that is the total. 1270 ewes, 380 lambs and 15 rams.

Q. The total then altogether is sixteen hundred and what? A. 1665.

The COURT.—1665 is what it foots up.

Mr. SUMMERFIELD.—(Q.) After the purchase of those sheep by the plaintiff, Mr. Holcomb, and the instructions for their removal, where did you next hear, or from what point did you next hear about that band of sheep?

A. Why, I think we had letters from them,—I didn't myself, I think my brother had a letter from McGarry at Goldfield, or from Goldfield.

Q. From Goldfield? A. Yes.

Q. About what time was that?

A. I could not state.

Q. Well, did you later hear anything from anyone about those sheep from Millers, or the vicinity thereof? A. Yes.

Q. When was that?

A. I received a telegram on the 5th.

Q. Who from? A. McGarry.

(Testimony of W. T. Holcomb.)

Q. What did you do in response to that telegram?

A. Well, the first things we done was wire him for the particulars of the case, and told him that we would go down that night, leave Reno that night for Millers.

Q. Did you leave that night?

A. Yes, we left that night.

Q. Who, if anyone, left with you?

A. Mr. Wheeler.

Q. Mr. Carl Wheeler, who is present and connected with the company, [105] as heretofore stated? A. Yes.

Q. What time did you reach Millers?

A. I don't remember the train time; I think it is about eight o'clock in the morning.

Q. Well, it was the next morning after, was it?

A. Yes, the next morning.

Q. What did you and Mr. Wheeler do after you got there, where did you go and who did you see?

A. We met Mr. McGarry and Mr. Heydenfelt there that morning, I think, and went right down to where the dead sheep were.

Q. Who went down with you?

A. Mr. Wheeler and Mr. McGarry, and I am not sure whether Mr. Heydenfelt went with us the first time we went down or not, I don't remember.

Q. How far was it from the station at Millers down to where you went, and where you found the dead sheep?

A. Why, I would think about a quarter of a mile; I didn't pay much attention to distance.

(Testimony of W. T. Holcomb.)

Q. Well, in what direction from Millers?

A. I would think almost east; I am not familiar with directions there, though.

Q. I will ask you to state whether you cut across the country, or whether you went from Millers, the town of Millers, if I might so call it, across the country, or by the road?

A. We went right down the road from Millers.

Q. I wish you would tell the Court in your own language, briefly, just what you saw as soon as you got down to where the sheep were that morning, just what the conditions were as you observed at that time.

A. Well, we saw the sheep lying there dead, a good many of them in the road, a lot of them close to the road.

Q. Now, what did you observe, if anything, with reference to water [106] where you saw the dead sheep in the road close to it?

A. Standing water in the road.

Q. And to what extent?

A. Well, there wasn't any great amount; I think, if I remember right, there was different wagon-ruts there, water standing in the wagon-ruts, and between where the different wagon-ruts were.

Q. What appearance did the road have, Mr. Holcomb, with reference to the frequency of its use?

A. Well, there were wagon tracks on the road.

Q. What about the course, did it indicate a fugitive, tortuous course, or a defined course?

(Testimony of W. T. Holcomb.)

A. No, it looked to me like an old travelled road.

Q. What, if anything, was done by you or Mr. Wheeler, or anyone else at that time, with reference to ascertaining the number of dead sheep?

A. Well, Mr. Heydenfelt helped us with some of his men to arrange the sheep, or separate them, so we could count them, get a correct count of them.

Q. Tell the Court how you counted them, and briefly, what the result of your efforts in order to ascertain the count, was.

A. Well, we started and piled them in rows, and then counted up the different rows.

Q. Well, were there any marks placed on them, or anything of that kind; was there any call-off or any tally made; explain that?

A. I am sure that we marked them all; they started in, I know, to mark them, so as not to count over again, that is, so they would not count the same ones twice.

Q. And marking how, with paint, or what?

A. Yes, with paint.

Q. How long a time did it take to make the count and make your tally?

A. Well, I don't know as I would state the exact time; we were there at least two or three hours, I think; that is, in [107] separating the sheep so we could count them, and making the count.

Q. Did you take a tally? A. Yes.

Q. How many did you find were killed?

A. 1095 head; I think it was ninety-five or ninety-six; I have not the tally with me at the present time.

(Testimony of W. T. Holcomb.)

Q. Well, you remember what the number was, do you?

A. If my memory is correct, it was 1095 head.

Q. What proportion of those, if you know, were ewes?

A. Well, we didn't count them separate so as to know; my judgment would be a certain per cent of the lambs, an average per cent of the number of lambs that were in the band.

Q. Well, after the recovery of the sheep that were not killed, did you ever count them to ascertain how that compared with the original number of the purchase?

A. I don't think they were counted until we got to Rawhide.

Q. Well, did you then?

A. Yes, we counted there.

Q. What was the number of survivors when you got to Rawhide?

A. Well, I think I have a tag with it on.

Q. Well, refresh your memory if you have something.

A. I think I had a tag with it on, if I remember right, 548 head.

The COURT.—(Q.) What was it?

A. 548 head.

Q. All told?

A. Yes, sir, that is all told, the survivors.

Mr. SUMMERFIELD.—(Q.) That is when you got to Rawhide? A. Yes.

(Testimony of W. T. Holcomb.)

Q. How far is it from Millers to Rawhide, do you know?

The COURT.—Just a moment. I understood you to ask him how many lambs there were among the survivors?

Mr. SUMMERFIELD.—No, how many survivors of the band.

The COURT.—(Q.) You didn't count the number of surviving lambs?

WITNESS.—I don't think we did; I don't remember now.

[108] Mr. SUMMERFIELD.—(Q.) The number that you last mentioned was the number of survivors of the band when they reached Rawhide, is that correct, Mr. Holcomb? A. I think that is correct.

Q. Do you know whether there were any lost in driving the survivors from Millers after this catastrophe, until you reached Rawhide?

A. No, I don't; that is before they got to Millers, there might have been a small loss before they got to Millers on the road.

Q. I will ask you to state to the Court, Mr. Holcomb, basing your answer to this question upon your experience as a sheep-man in the State of Nevada, taking into consideration the character and grade of these particular sheep, the time of season in which their death occurred in the vicinity of Millers, your observation of the sheep when you went the next morning after they were dead, and saw the survivors, what the general market value of those sheep would

(Testimony of W. T. Holcomb.)

be at that time and place, and under the circumstances I have indicated?

A. Well, I would say at least six dollars a head, and very likely have sold for more; I think they could have been sold for more money at the time.

Q. What particular elements, without being tedious about it, do you take into consideration in fixing your value at that time?

A. I didn't thoroughly understand the question, Mr. Summerfield.

Q. I said what particular elements do you consider in connection with the general price of sheep in fixing their value at that time and place, and I mean with reference to the time of year, the gender of the sheep, approximately the lambing season, the amount of wool they had on, approximately the shearing season, and those matters?

A. I figure from the amount of wool I thought they would shear and the percentage of lambs they would raise, and the class of the sheep.

Q. I wish you would state to the Court, Mr. Holcomb, what is your [109] best judgment, if you have a judgment upon that subject, that sheep at that time of year, and of this grade and character of sheep, could be driven in moving from one point to another, safely without water? In other words, how frequently should they be watered without serious injury or damage to the sheep?

A. Well, I would say it would not be necessary at all to give them water oftener than every other day;

(Testimony of W. T. Holcomb.)

I would say that they would go at least three or four days without suffering, without water.

Q. Does it not make a difference with reference to the time of year in which they are driven?

A. Oh, yes, it does.

Q. And in what respect?

A. At that time of year, in the winter time, why, it is cooler and usually frost in the morning, frost on the feed, on the brush or whatever they feed on, and moisture that they get from frost.

Q. Did you observe the country where you found the sheep killed with reference to whether there was verdure or grazing feed there?

A. What kind of feed?

Q. Any what you would call grazing feed or verdure.

A. There is what we call a desert feed, a brush that sheep live on.

Q. What, according to the best of your judgment, and as the result of your actual observation when you got there, was the percentage of sheep that were dead on the road, or on the side of the road opposite from the impounding dam of the defendant company? Do you understand that question, Mr. Holcomb?

The COURT.—Perhaps if you would point to the place on the map he would understand it.

Mr. SUMMERFIELD. — Very well. (Q.) You have heard this map explained in court, you have been sitting here; you understand the map, don't you? A. I think I do, yes, sir.

(Testimony of W. T. Holcomb.)

[110] Q. Would you designate on the map yourself, about the point where you found the sheep when you and Mr. Wheeler went there on the morning of the 6th day of February of the present year?

A. Taking this point here as the pump-house (indicating on map), I would think that we found the sheep right here, right about here (indicates).

Q. At that point marked blue, practically?

A. That was supposed to be the water on the road; we found the sheep right here.

Q. Now, what percentage, if any, of them did you find on this side over here?

The COURT.—That is on the west side of the road?

Mr. SUMMERFIELD.—On the west side.

A. Didn't find any at all; we probably found ten or fifteen sheep across these branch roads here; I would not say there was that many, there might have been; I remember a few sheep being across the road here.

Q. Now, that is at the point marked there point "1," near that point? A. Yes.

The COURT.—You found ten or fifteen sheep on the west side of the road, near point "1"?

A. I would not say for certain how many; I remember a few scattered sheep being just across the road; if I remember right there is a fence there, I found a few sheep against that fence.

Mr. SUMMERFIELD.—(Q.) Where did you find most of them now with reference to the road itself,

(Testimony of W. T. Holcomb.)

or the east side of the road?

A. We found the most of them out here on the road.

Q. How did you find them with reference to the actual road itself at that point?

A. Well, I would think at least one-fourth of them right in the road.

[111] Q. At least one-fourth of them right in the road? A. Yes, or at the edge of the road.

The COURT.—One-quarter of them at the edge of the road?

A. My judgment would be it was that many; we didn't count them to see.

Q. In the road and at the edge of the road?

A. Yes, at the edge of the road, and in those ruts.

Mr. SUMMERFIELD.—(Q.) How far were the farthest ones you observed to the east of the road itself?

A. Oh, they were back, I would say some of them back almost a hundred yards from the road.

Q. And your best judgment, if I understand you correctly, at the present time is that something like fifteen were just across the road?

A. Yes, right across the road.

Q. Did you have any conversation with Mr. Heydenfelt, the superintendent of the company, when you went down with him there, about the water?

A. Yes—I didn't understand, I answered yes before I understood the question, before you asked all the question.

(The reporter reads the question.)

(Testimony of W. T. Holcomb.)

A. I did; I don't remember, though, just exactly what the conversation was.

Q. That was the next morning after the transaction, I don't know exactly whether it is competent at this time or not. Who was present at the conversation? A. Mr. Wheeler and Mr. McGarry.

Q. And where did it take place, at what particular place?

A. Why, at Mr. Heydenfelt's office, I think.

Q. Well, what was stated by either you or Mr. Heydenfelt and Mr. Wheeler?

Mr. BROWN.—He has already stated that he does not remember that conversation.

[112] Mr. SUMMERFIELD.—I did not understand him to say that.

Q. Did you say you didn't remember?

A. I don't remember, no, not exactly what we said, what the conversation was with regard to the water.

Q. Well, if you don't remember you can't state it. Did you observe a pump-house there when you went down? A. Yes.

Q. About how far from that pump-house was the place where you found the dead sheep?

A. I should think somewhere from fifty to one hundred feet, maybe not that far.

Q. What, if anything, did you do yourself, Mr. Holcomb, for the purpose of ascertaining the source from which that water came, when you found the dead sheep?

A. I didn't do anything, that is, myself, right there; Mr. Heydenfelt and I went out and took sam-

(Testimony of W. T. Holcomb.)

ples farther out, of water.

Q. Did you or did you not observe an impounding dam in a southwesterly direction from where you found the sheep? A. I did.

Q. Did you go over towards that at all?

A. Yes, went up to it.

Q. Did you go over to it? A. Yes.

Q. I wish you would state to the Court in what condition you found that impounding dam where you went over, and between the point where you found the sheep and the crest of the dam.

A. Well, we found where it had broken over different places; washes where it had run down from the impounding dam, down onto the flat; and while we were there it broke over, right while we were there—run out.

Q. In what direction was the course of the discharge from these breaks at the impounding dam?

A. Well, in the direction of the dry flat, or, as you have that map there, running right off in that direction; I am not familiar with the directions there so as to [113] say whether it was east or north.

Q. Well, the top of that map is north, Mr. Holcomb? A. Northeast.

Q. Northeast. What, if any, evidences did you observe with reference to any channels, or traces of watercourses from the foot of the break at the impounding dam in a northeasterly direction?

A. Well, if I remember right, I saw two or three different places where the water had run from the impounding dam down to the flat.

(Testimony of W. T. Holcomb.)

(A recess is taken at 12 o'clock until 1:30 P. M.)

AFTER RECESS—1:30 P. M.

Direct Examination of Mr. W. T. HOLCOMB
(Resumed).

(By direction the reporter reads the last question and answer.)

Mr. SUMMERFIELD.—(Q.) Did you or did you not notice, Mr. Holcomb, whether the impounded water at the dam was higher or lower than at the flat where the sheep were killed?

A. It was higher, considerably higher.

Q. Can you state to the Court what the general declination or declivity of the country was from the dam with reference to that point where the sheep were killed?

A. I would call it a gradual slope from the dam down to the place where the sheep were killed.

Q. Did you observe whether or not the country between where the dam was and where the sheep were killed, and the immediate surrounding country, whether it was open and uninclosed, or whether it was fenced?

A. Right at the dam I noticed some,—it was what looked to be where there had been an old fence, but the posts were nearly covered with the dam, and from there on down; I think one part close to the pump-house there was a fence, below the dam; but [114-115] there was no fence at the place where the sheep were killed; it was open.

Q. Was there any fence in any of the surrounding country between where the sheep were killed and the

(Testimony of W. T. Holcomb.)

impounding dam, with the exception of that small plot around the pump-house, or near the pump-house?

A. I think not.

Mr. SUMMERFIELD.—If your Honor please, with the permission of the Court, and if agreeable to counsel, I would like to withdraw this witness from the stand, and place another witness on whose examination will be very short. Mr. Holcomb will be put on later for cross-examination. Is that agreeable to you, Mr. Brown?

Mr. BROWN.—That is agreeable.

Mr. SUMMERFIELD.—Call Mr. S. H. Wheeler.

[Testimony of S. H. Wheeler, for Plaintiff.]

[116] Mr. S. H. WHEELER, called as a witness on behalf of plaintiff, after being sworn, testified as follows:

Direct Examination by Mr. SUMMERFIELD.

Q. What is your name? A. S. H. Wheeler.

Q. Where do you live? A. Reno, Nevada.

Q. How long have you lived there?

A. Since 1895.

Q. Are you any relation to Mr. Carl Wheeler, or anyone who is connected with the Sierra Land and Livestock Company? A. No, sir, I am not.

Q. You have no connection with them at all?

A. No connection at all.

Q. Do you know anything about this case at all?

A. No, sir; I have heard of it, that is all; I don't know anything about it.

Q. What?

(Testimony of S. H. Wheeler.)

A. I have heard of the case, that is all.

Q. You have heard there was such a case?

A. Yes.

Q. You know nothing about the facts in the case?

A. No, I do not.

Q. Have you been engaged in the sheep business any, Mr. Wheeler? A. Yes, sir, I am now.

Q. How long have you been engaged in it?

A. About forty years.

Q. And where?

A. In Nevada and California.

Q. Mr. Wheeler, I wish you would state to the Court, if you can, basing your answer to this question upon your experience as a sheepman in Nevada, and in the number of years you have testified to, what "A" grade merino yearlings and coming yearling lambs were worth at Millers, Nevada, or in the adjacent western country of Nevada, during or about the month of February of the present year?

[117] A. Of this year?

Q. Of this year.

A. Well, I should say good grade merino ewes, young ewes from one to five, would be worth from six to six and a half dollars a head just before lambing.

Q. Now, I have reference to the month of February. A. Yes, sir.

Q. And I have particular reference, Mr. Wheeler, to the 5th day of February.

A. Well, I would say they would be worth six and a half a head.

(Testimony of S. H. Wheeler.)

Q. What about coming yearling lambs?

A. Coming yearlings, ewe yearlings, should be worth five dollars a head, grade merinos.

Q. What were bucks worth?

A. Merino bucks?

Q. Cross-bred bucks?

A. We paid fifteen dollars a head for bucks in the fall; of course, in the spring they would not be worth quite that much, because you would have to summer them; but they are worth fifteen dollars a head.

Mr. SUMMERFIELD.—You may cross-examine.

Cross-examination.

Mr. BROWN.—(Q.) Are you engaged in the business individually, Mr. Wheeler, or as a copartnership, or as a stockholder and officer of some corporation? A. Individually.

Q. Individually? A. Yes, sir.

Q. And you have been engaged in this State for some years in that way?

A. Well, I have been engaged since 1888 in this State by myself and with my brother; for the last fifteen years by myself.

[118] Q. And you are familiar with all branches of the sheep industry? A. Yes, sir.

Q. Have you bought sheep all over the State?

A. Yes, sir, and also in Oregon.

Q. Bought sheep in Southern Nevada?

A. Well, I ran sheep in Southern Nevada for about seven years.

Q. How long ago? A. 1900.

Q. You have not run any down there since then?

(Testimony of S. H. Wheeler.)

A. No; I wintered sheep in Southern Nevada, that is, north of Mina, around Rawhide country.

Q. Is there any particular reason why you have not run sheep south of those points since 1900?

A. Well, the only reason was I moved my sheep outfit to Reno—sold out south.

Q. Would the fact Nye and Esmeralda counties, and more particularly those neighborhoods around Goldfield and Tonopah and Millers, have become mining and milling centers, where cyanide is used and is discharged out upon the open country, would that fact change your policy in running sheep down there?

A. Oh, I would not think so; that country is used for winter and spring only, there is no summer range in that country.

Q. There is no summer range?

A. Except in the mountains, I suppose; but the desert country, we use it for winter range.

Q. Are sheep values low this year, more particularly during the first three months of the year?

A. How is that, lower than they were the first three months?

Q. Are sheep values this year lower than usual?

A. No, they are not.

Q. In the conduct of your business, I suppose you have dealings with the Nevada Tax Commission?

A. Yes, sir.

[119] Q. And have had dealings during the current calendar year with that commission?

(Testimony of S. H. Wheeler.)

A. Well, I have had a statement from them, to be filled out.

Q. Did you submit any statement to them this year? A. No, sir, I have not.

Q. Did they call upon you for a statement?

A. I think I had a pamphlet from them to fill out.

Q. Will you state what value the Nevada Tax Commission has put upon sheep during this year?

Mr. SUMMERFIELD.—If your Honor please, I object, first, on the ground it is not in cross-examination; second, upon the ground that any answer made to that would be hearsay, that the Tax Commission itself, or its reports, would be the best evidence; and, third, upon the ground that any valuation placed by the tax commission itself under the law is subject to equalization, and is not final.

The COURT.—Do you insist on the question?

Mr. BROWN.—I will submit it, your Honor.

The COURT.—I will sustain the objection.

Mr. BROWN.—(Q.) Upon what sheep valuation per head, are you paying taxes this year?

Mr. SUMMERFIELD.—I object to that, if your Honor please, upon the ground it is immaterial whether he is assessed low or high; that the question before the Court is what, as nearly as can be ascertained, was the reasonable market value of the sheep, which are the subject of the controversy, at the time and place that they were lost.

Mr. BROWN.—That question I think is directly responsive to the issue here—the actual value of the sheep.

(Argument.)

(Testimony of S. H. Wheeler.)

A. I purchased a thousand; that included part lambs.

Q. What proportion of them were lambs?

A. One-third.

Q. And what were the other two-thirds?

A. Ewes—stock ewes.

Q. What were the latest purchases you made in 1913? A. It was some time in October.

Q. What did you pay for sheep in October, 1913?

A. I paid four and a half at Lakeview, Oregon.

Q. How many sheep did you purchase at that figure?

[122] A. I think there was about seven hundred, six or seven hundred.

Q. What grade were they?

A. They were merinos, graded merinos, some coarse and some graded.

Q. What is the lowest price that you know of any sheep-man paying for sheep in 1914?

A. I don't know; I think the general run has been from five to five and a half, last fall, of ewes, that is, taking the run of the ewes.

The COURT.—Last fall, you mean a year ago?

A. This present fall.

Q. Five and five and a half?

A. Yes, sir; I have heard of one sale, I think, of six dollars, only heard of it.

Mr. BROWN.—(Q.) The value of sheep in Reno would be higher than in Southern Nevada, in Esmeralda County, wouldn't it?

(Testimony of S. H. Wheeler.)

A. Well, it would be according to the part of the year.

Q. Well, say in February, 1914?

A. Well, I think that sheep would be just as valuable, stock sheep, out in the desert in February as they would be in Reno.

Q. There would not be any difference? A. No.

Q. Who would assume the cost of transportation from Southern Nevada to Reno?

A. Who would assume the cost?

Q. Who would bear the cost?

A. Why, the party that owns the sheep, I suppose.

Q. Do you know what the value of pelts is?

A. No, I do not right now.

Q. What is the general value of pelts?

Mr. SUMMERFIELD.—Just a moment.

Mr. BROWN.—I withdraw it.

Q. Did I ask you earlier in your examination if sheep values were low this year?

[123] A. You asked me if they were lower than they were last year.

Q. What was your answer? A. They are not.

Mr. BROWN.—That is all.

Mr. SUMMERFIELD.—Just one other question.

(Q.) Is it or is it not a fact that neither you nor anyone else in Washoe County at the present time know what the taxes are there, and that the roll has not been turned over, or has not been extended, so that the taxpayers know there?

A. I think that is correct; my impression was it

(Testimony of W. T. Holcomb.)

would be about three dollars.

Mr. SUMMERFIELD.—That is all.

[Testimony of W. T. Holcomb, for Plaintiff—Cross-examination.]

[124] Mr. W. T. HOLCOMB, takes the stand for cross-examination.

Mr. BROWN.—(Q.) How long have you been engaged in the business, Mr. Holcomb, in Nevada?

A. Why, as long as I have been old enough to handle sheep I have been more or less engaged in the sheep business, about thirty years or over, I should think.

Q. You are familiar with every branch of the industry, I presume?

A. Yes, pretty familiar, I think.

Q. Were you pretty actively engaged in the business during the year 1914? A. Yes.

Q. Handled other bands of sheep in addition to this band? A. Yes.

Q. Bought and sold? A. Yes.

Q. Did you buy any other sheep in Southern Nevada in 1914? A. No, we did not.

Q. Did you buy any other sheep in February, 1914? A. No.

Q. Buy any in January?

A. Not that I know of, I don't think we did.

Q. What was the earliest month in 1914 that you bought sheep? A. Well, this lot in January.

Q. What was the next band you bought after this lot?

(Testimony of W. T. Holcomb.)

A. Well, not until very lately, 5th day of this month, I think.

Q. The 5th day of November? A. Yes.

Q. How many did you buy at that time?

A. About six hundred and fifty.

Q. Where did you buy them?

A. Reno, or close to Reno.

Q. What did you pay for them?

A. Five seventy-five a head.

Q. What grade of sheep were they?

A. They were grade merino.

[125] Q. Ewes? A. Ewes, yes.

The COURT.—(Q.) What was the proportion of ewes and lambs?

A. There was no lambs at all in that lot.

Mr. BROWN.—(Q.) In your direct examination you stated that the number of sheep that were killed was 1095; if the complaint states 1090 that would be the correct figure, would it not?

A. I think I have said that I thought that was the correct number; I can get the correct number from our books.

Q. But the complaint would have the correct number, would it not?

A. Yes, I think that has the correct number.

Q. Mr. McGarry was recommended to you as a competent man to bring the sheep to Rawhide?

A. Yes, he was.

Q. You counted on his being a competent man to bring the sheep safely through that particular country?

(Testimony of W. T. Holcomb.)

A. We did, yes; he was interested in the sheep, I believe, at the time my brother bought them.

Q. Wasn't it your expectation that he would keep close to the snow hills in coming north, and depend upon the snow?

A. No, I can't say that it was, because I wasn't familiar with the country myself; the only instructions I gave my brother was to have him bring them through as direct as they could as soon as they could to Rawhide.

Q. Had you ever been in Southern Nevada before?

A. No, I never had, that is, in that portion.

Q. Basing your answer upon your experience as a sheep-man, would you say it was prudent for a man to drive the sheep so close to the cyanide mill at Millers?

A. I think that would be left to the man's judgment driving them.

Q. Basing your answer upon your experience, would not you say that a prudent and careful man, knowing that those were cyanide mills, [126] and knowing the qualities of cyanide, wouldn't he have taken a course that would have avoided the close proximity to those mills?

A. Why, I should think that if he believed that the cyanide was impounded, and no way for it to get outside, he would not be afraid of driving anywhere outside, as long as they kept away from the pond, didn't get onto the pond.

Q. While you were at Millers on or about the 6th

(Testimony of W. T. Holcomb.)

of February, did you have a conversation with Mr. Heydenfelt in which you criticized McGarry's handling of the sheep?

A. I don't remember that I did.

Q. Did you say in any such conversation that it was not your expectation that he would bring the sheep through Millers, or near Millers?

A. I might have said that I didn't know he would come through Millers; I didn't know exactly which way he would come, not being familiar with the country; I didn't know whether he would come by Millers, or some other route altogether.

Q. What is the lambing and shearing season, Mr. Holcomb?

A. Well, the lambing season is usually the month of April, and sometimes we shear before lambing, in the month of March, depends on the weather conditions; other times afterwards, in May.

Q. You had another flock of sheep at Rawhide?

A. Yes, Mr. Wheeler had a flock of sheep at Rawhide; the company didn't have any sheep at Rawhide at the time.

Q. How much did you realize from the sale of the pelts?

Mr. SUMMERFIELD.—I object, if your Honor please, upon the ground that is a portion of the defense in this answer; it is anticipating the defense, and it is out of order; and, further, it is not in cross-examination at all. My objection is more to the orderly procedure than it is to the effect of the testimony.

(Testimony of W. T. Holcomb.)

Mr. BROWN.—Well, I think that is true, and since counsel insist [127] upon it, I must abide by it.

Mr. SUMMERFIELD.—Well, if counsel prefer to ask at the present time, I won't insist on the objection; but I don't wish it understood that admitting the testimony at this time, out of order, will preclude me from any testimony in rebuttal.

Mr. BROWN.—Very well.

The COURT.—Then you can consider this testimony as your testimony in chief.

Mr. BROWN.—Yes.

Q. What did you realize from the pelts, Mr. Holcomb?

A. If I remember right, I think it was ninety cents apiece.

Q. Ninety cents apiece?

A. Yes, that was the price paid, deducting the freight; we have an account of it, I haven't it with me; we have a correct account of the sale, shipping expense, and all expense attached.

The COURT.—(Q.) Ninety cents each?

A. If I remember correctly, that is it.

Mr. BROWN.—(Q.) The pelts were taken from the carcasses a day or two after the sheep were killed, and shipped out for sale? A. Yes.

Mr. SANDERS.—Pardon me a moment, I didn't understand the witness' answer. Ninety cents, gross or net?

The COURT.—Net.

WITNESS.—No, gross.

(Testimony of W. T. Holcomb.)

The COURT.—I thought you said ninety cents, deducting the expenses?

A. Ninety cents each, but the freight should be deducted from that.

Mr. BROWN.—(Q.) Now, how many pelts were there?

A. I don't remember the exact number without getting the figures on it; we have the figures, but I haven't them with me.

[128] Q. You recovered the pelts from nearly all the carcasses, did you?

A. Nearly all the carcasses; I don't think there was a difference of but only two or three or three or four.

Q. There would be 1090 pelts less probably not more than five?

A. I don't think there was any more than that difference.

Q. And the expense connected with the pelts was the expense of skinning the sheep, and shipping them out? A. Yes.

Q. Do you know about how much the total expense was?

A. No, I would not say without having the figures on it; I can get them, if you wish.

Q. I wish you would.

A. I will send and get them, and I think I can have them here to-morrow morning.

Mr. BROWN.—I wish you would; I think that is all.

(Testimony of W. T. Holcomb.)

Mr. SUMMERFIELD.—(Q.) You say you have the exact figures?

A. I can get them, if you wish.

Q. I think we had better have them. Who bore the expense of skinning the sheep, and disposing of the carcasses, and shipping the pelts?

A. Why, the Sierra Nevada Land and Livestock Company.

The COURT.—What was the answer?

A. The Sierra Nevada Land and Livestock Company.

Mr. SUMMERFIELD.—That is all.

Mr. BROWN.—(Q.) Where did you shear these sheep, the surviving sheep, where did you shear them, at Pyramid?

A. No, I think they were shorn with a lot of Mr. Wheeler's sheep. I am not sure about that,—at the Chalk Hills down there, what they call the Chalk Hills, in the neighborhood of Virginia City.

Q. Chalk Hills near Virginia City? A. Yes.

Q. When were they sheared?

A. Some time in May.

Mr. BROWN.—That is all.

[Testimony of Carl S. Wheeler, for Plaintiff.]

[129] Mr. CARL S. WHEELER, called as a witness on behalf of plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. SUMMERFIELD.

Q. Is your name Carl S. Wheeler? A. Yes, sir.

Q. Where do you live? A. Reno.

(Testimony of Carl S. Wheeler.)

Q. How long have you lived in Reno?

A. I was born in Reno.

Q. Lived in Nevada all your life?

A. All my life.

Q. Do you know the Sierra Land and Livestock Company? A. I do.

Q. What connection have you with that company?

A. I am a stockholder and director in that company.

Q. Mr. Holcomb is the president of the company, the witness who has just left the stand? A. Yes.

Q. What experience have you had with sheep?

A. I have been in the sheep business since I was old enough to know anything about it.

Q. Well, how long is that, I don't know how old you are yet.

A. Well, I guess I have herded sheep, or driven and taken care of sheep, for more than twenty years.

Q. You are a son of D. C. Wheeler? A. Yes.

Q. You are acquainted with Mr. McGarry?

A. I am.

Q. What recollection, if any, have you, Mr. Wheeler, about a band of sheep belonging to the Sierra Land and Livestock Company meeting with a catastrophe at Millers about the 5th day of February of the present year; when did you first hear about it?

A. Why, I recall talking with Mr. Holcomb, and sending Mr. George Holcomb to Springdale for the purpose of buying a band of sheep, and that I later heard that they had been bought.

(Testimony of Carl S. Wheeler.)

[130] That was before February, was it?

A. That was some time about the 20th of January.

Q. Did you hear anything about that band along in the early part of February?

A. I had a telegram from Mr. McGarry on the 5th of February that the sheep had got poisoned water, and asking me to come down.

Q. Did you go down?

A. Yes, I went down that night.

Q. Did anyone go with you?

A. Mr. Holcomb went with me.

Q. When did you get to Millers?

A. About eight o'clock the following morning, the morning of the 6th.

Q. Upon your arrival at Millers where did you go, and who, if anyone, went with you?

A. I met Mr. McGarry, and my recollection is that he and Mr. Holcomb and I went down to where the sheep were lying, about a quarter of a mile from the town.

Q. In what direction? A. Northerly direction.

Q. How did you go from Millers, or from the station?

A. I recall that we walked out on the road that led directly to them.

Q. What condition did you find when you arrived there with reference to the sheep, and where they were situated, and whether they were dead or alive, just explain that.

A. I didn't see anything when I got there excepting dead sheep lying right along the road on which we

(Testimony of Carl S. Wheeler.)

came out from Millers.

Q. Where did the dead sheep appear to be with reference to the road, Mr. Wheeler?

A. A large part of them were lying in the road and right to the sides of the road.

Q. On which side of the road were most of them?

A. The most of them were on the east side of the road.

[131] Q. What did you observe with reference to any that were upon the west side of the road at the place where you saw them?

A. There were a few sheep on the west side of the road, but they looked as if they were dying; they simply struggled across the road and dropped there.

Q. What was the appearance of the road there with reference to travel?

A. The road looked to me to be a well traveled road.

Q. What, if anything, was done at the time, or soon thereafter, with reference to ascertaining the number of sheep that were dead, or what the loss was?

A. About that time we met Mr. Heydenfelt, and we—

The COURT.—Do you dispute the number of sheep that were killed?

Mr. BROWN.—No; 1090.

Mr. SUMMERFIELD.—Then, I don't see any use of pursuing that, if that fact can be considered as admitted, that 1090 is the correct number.

Q. I wish you would state to the Court, if you can,

(Testimony of Carl S. Wheeler.)

Mr. Wheeler, what percentage of those sheep were ewes and what part were lambs.

A. Why, I was informed that 1665 sheep were bought at Springdale, and the count of the dead sheep at Millers was 1090; there was 548 sheep received at Rawhide.

Q. Of those how many were lambs?

A. I was informed by my men who counted them, I was not there, that there was 180 lambs.

Q. What were the original proportions of the purchase; how many were ewes, how many lambs, and how many bucks?

A. Mr. Holcomb stated it from the check that was drawn, but I don't remember the exact proportion.

Q. Then you can pass that portion, I think that is already in. I will ask you to state, Mr. Wheeler, to the Court, basing your answer [132] to this question propounded upon your knowledge of the sheep business and of the condition of the sheep industry in Nevada and Millers and the adjacent country thereto in February, and about the time that these sheep were killed, what that grade of sheep was worth currently on the market?

A. I should say that the ewes were easily worth six and a half, and the lambs four and a half.

Q. Is there any difference in the value of the sheep, and particularly of ewes, in February and at later seasons in the year?

A. There most certainly is; the principal cost of handling sheep is from February until the latter part of the summer, or the first part of the fall; the crops

(Testimony of Carl S. Wheeler.)

are taken from them at that time, the lambs and the wool, consequently the sheep at the beginning of the season, or in November, would be worth considerably less than just before the time we were to reap our crop, and after we had taken them through the winter at an expense and loss.

Q. What in your judgment as a practical sheepman would be the difference in value in sheep in February, and later in the year, say in September and October?

A. I should say a band of sheep that was worth, for instance five dollars the first of November, the same sheep after they had been run to the first of February, would easily be worth six and a half, providing conditions are the same as to markets.

Q. You had never seen the sheep, personally, until you saw them dead there? A. I had not.

Q. Did you observe from their appearance what character and grade of sheep they were?

A. I would call them a good class of merino ewes, ranging from two to five years of age.

Q. And the lambs—this is rather leading, Mr. Brown—were they what we call coming yearlings?

A. Yes.

[133] Q. When you went to the place where you found the sheep dead, Mr. Wheeler, what was the condition of the road at that time with reference to water—dry road, or what?

A. There was a pool of water in the road, and the ruts of the road were filled with water.

Q. Did you look around the surrounding country

(Testimony of Carl S. Wheeler.)

there any to see where the water came from, so far as you could tell it from surface indications?

A. Why, I examined to the westerly part, to the west of where the sheep were killed.

Q. Just state to the Court concisely what you saw.

A. I made up my mind that the water that was standing in the road had escaped from the ponds above the road.

Q. Could you tell the Court really why you made up your mind?

A. I seen where water had run over the banks, and where it had broken through the banks and run down in that direction, making watercourses.

Q. Were they or were they not traceable?

A. They were traceable, yes.

Q. How far, apparently, was the dam from where this pool of water in the road was where you found the sheep?

A. I should say eight or nine hundred feet; that is simply a guess.

Q. And in what direction?

A. The pool of water was northeasterly from the dam.

Q. I wish you would state to the Court whether the dam and the impounded water there was higher, or what the elevation was as compared with the place where the sheep were killed.

A. It is considerably higher.

Q. Well, what would be your approximation?

A. Well, it looked to me to be ten or twelve feet

(Testimony of Carl S. Wheeler.)

higher from the level of the water in the pond to the pool in the road.

[134] Q. Now, where did you follow up those water traces, Mr. Wheeler, when you first went there?

A. I didn't pay very much attention to them; I simply walked over there, and saw the water had come from that dam.

Q. Did you observe a pump-house there?

A. I did.

Q. How far is it from the place where you found the slaughter, or the dead sheep?

A. Probably the nearest sheep was fifty to seventy-five feet away from the pump-house, I should think.

Q. I will ask you to state to the Court, Mr. Wheeler, if you are able so to do, whether that general country surrounding where the sheep were, was inclosed or open uninclosed country?

A. The general country was open and uninclosed.

Q. Have you ever travelled that road at any further point north from where you found the sheep?

A. I never did except to walk up there a hundred yards or so.

Mr. SUMMERFIELD.—You may cross-examine, reserving the right if we wish to question him further about something that don't occur to us just at present.

Cross-examination.

Mr. BROWN.—(Q.) Mr. Wheeler, there wasn't any doubt in your mind that the cyanide came from the pond? A. No, there was no doubt.

(Testimony of Carl S. Wheeler.)

Q. It seemed pretty plain to you, did it?

A. It seemed plain to me.

Q. You could see just at a glance there that the cyanide came down from the pond, could you?

A. I could see the way it ran from those ponds and where it was standing in the road.

Q. It did not require any special investigation?

A. It did not.

[235] Q. So if a man had been told that there might be cyanide in that water, if he had gone down to that pond he could see pretty quick that there would be cyanide there, couldn't he?

A. By going across the road and up toward the dam, I should think so, if he knew there was cyanide in the pond.

Q. What month is the high price or top figures for sheep values?

A. I should say in March, for ewes.

Q. What month is the low value for sheep?

A. In September, or after the lambs are taken from the ewes.

Q. Would not the top value be just before the cropping time? A. I should think so.

Q. That would be the latter part of the year, wouldn't it, August or thereabouts?

A. Well, you can place a value on your lambs at that time, and separately upon your ewes.

Q. The value would be higher on the ewes in May than in February?

A. In April or March, before they lambed.

Q. If you took the harvest in May when would be

(Testimony of Carl S. Wheeler.)

the high value on the ewes?

A. We don't take the harvest in May, except to shear the wool off.

Q. Well, for that purpose?

A. The high value on the ewes would be the first of April or before they started in to lamb, or before the wool was taken from them.

Q. When you were at Millers did you have a conversation with Mr. Heydenfelt, in which you told him that sheep prices were low, and that you were taking these sheep to Rawhide, a stock arrangement, and to hold them with the expectation of getting better prices? A. I did not, no.

Q. Did you have any conversation at Millers in February with Mr. Heydenfelt that was anything like that?

A. I had several conversations with Mr. Heydenfelt at Millers, but [136] none of them were on that subject that I know of; I might have told him the values of sheep as I considered them throughout the country.

Q. Did you tell him that sheep values were low at that time?

A. I don't believe I did, because they were not.

Q. Did you tell him that you were taking the sheep to Rawhide to stock the ranges and to hold them with the expectation of getting better prices?

A. No, if I told him anything, I told him that we were taking the sheep to Rawhide to stock the ranges, no doubt.

(Testimony of Harland Acree.)

Mr. BROWN.—That is all.

Mr. SUMMERFIELD.—That is all, Mr. Wheeler.
That is plaintiff's case in chief.

[Testimony of Harland Acree, for Defendant.]

[137] Mr. HARLAND ACREE, called as a witness on behalf of defendant, having been sworn, testified as follows:

Direct Examination by Mr. BROWN.

Q. Will you state your name?

A. Harland Acree.

Q. Where do you reside? A. At Millers.

Q. How long have you been there?

A. Since the 15th of May, 1913.

Q. What is your business or employment there?

A. I am in charge of the electrical department for the Nevada-California Power Company.

Q. How long have you held that position?

A. Since the 15th of May, 1913.

Q. Do your duties take you out over the surrounding country?

A. Yes, I am in charge of lines out of Millers.

Q. What other communities do your duties take you to?

A. It takes me to Manhattan, to Tonopah, and half way to Silver Peak, from Millers.

Q. Where did you reside before you went to Millers? A. In Tonopah.

Q. How long did you reside there?

A. About two years.

(Testimony of Harland Acree.)

Q. Where did you reside before you went to Tonopah?

A. Five years prior to that I was in Round Mountain.

Q. Were you at Millers when William McGarry, the sheepman came there in February, 1914?

A. Yes, sir.

Q. Do you know him? A. Yes, sir.

Q. You had met him before? A. Yes, sir.

Q. Where had you met him?

A. I had met him in Rhyolite during the campaign, the political campaign of 1912.

[138] Q. Were you campaigning then?

A. Yes, sir.

Q. For what office?

A. The office of County Clerk of Nye County on the Democratic ticket.

Q. Did you meet McGarry at Millers on February 4th, 1914? A. Yes, sir.

Q. Where did you meet him?

A. In front of Dale Brothers store.

Q. Did you have a conversation with him there?

A. Yes, sir.

Q. Just go ahead and state the conversation that you had with him.

A. The morning of the 4th of February, about between nine and ten o'clock in the morning, I had gone over to the store to get the mail on the ten o'clock train, my brother in law was with me, and we were standing in front of the store with four or five other men waiting for the train, it wasn't in yet, and we

(Testimony of Harland Acree.)

saw a wagon coming down the road, some one says, "Here comes some travellers," and I spoke to my brother-in-law, and says, "It looks like a sheep outfit to me." McGarry drove up to the front of the store, tied his team, got out and came up on the porch, and I says to Bohannan, "Let's go inside, and perhaps we can get a sheep, if he has any, or mutton," so we followed him in the store; he stayed there a few minutes, and came outside, and we followed him out; he walked over to the end of the porch and asked a man by the name of Cranda if he could direct him on the road to Mina, and Cranda started to direct him; I didn't overhear what Cranda said, but a man by the name of Lacy, oiler at the Desert Power and Mill Company's Mill, says, "Here is a man that can tell you the road to Mina," and he pointed to me; and McGarry says, "Can you tell me the road to Mina?" and I went over and directed him from the store, down to the power-house, from the pump-station told him to take the left-hand road when he got around the corner of the road from the pump-station, and then [139] take the first right-hand road, and then to skip the next two right-hand roads he came to; I says, "I am not sure whether there are any more roads to turn off or not, but go straight toward Crow Springs," and I pointed in the direction of Crow Springs, and directed him on as well as I could from Crow Springs to Mina; and I says to him, "What have you got, some sheep?" and he says yes, and I think right then he says to me,

(Testimony of Harland Acree.)

“What is that water down there, cyanide water or rain-water?” and I says, “Well, I think it is rain-water, it has rained in there, but I wouldn’t take a chance on it if I were you; if you have sheep and want feed and water for them, go to the lake,” and he says what lake, and I directed him to the lake there three miles from Millers in a southwesterly direction, showed him how to get down there; and I says, “There is pretty good feed down there, and it is good water,” and he says, “Is the lake boggy?” and I says, “No, a good hard botttom; you can hunt ducks there, go all through it, it is only about knee-deep,” and I says, “When you leave the lake, if you are going to drive your sheep off towards Mina, the intake of the lake is on the other side; follow it up to where it crosses the railroad track, then you can follow it out from the railroad track until you come to the junction of Clover Creek and Peavine Creek, the left-hand creek coming in, and that will take you to within six miles of Crow’s Springs; I don’t know how much water there is at Crow’s Springs, but some; you will have good water until you get to six or eight miles of Crow’s Springs.” He says, “Where does the lake come from?” and I says, “From Peavine,” and pointed to the mountains at the head of the valley, and showed him where Peavine was. The country down there was covered with water at the time, and he says, “Is that water down there the same water we see at the other side?” I says, “No, the water you see here [140] is not the same; there are two flats; in other

(Testimony of Harland Acree.)

words, one small flat and a bigger flat, and you can notice a sand bar down there between the two flats, and this water can't get over into the other one." We talked along, I asked him where he was from, and he told me he was down from Rhyolite, and I asked him where he was going, and he said he was going to Rawhide; and I said, "Where do you range your sheep at Rhyolite?" and he says, "Up around the Lida Mountains around Meadow"; and I asked him if he knew our substation man at Palmetto; and he says, "Let's go over and have a drink," and we went over to the saloon and had a drink, and came back, and then I asked him if I hadn't met him in Rhyolite, I told him his face was familiar, and I introduced myself to him, and he said he had heard my name, and I said, "Didn't I meet you in Rhyolite?" and he said yes, he was there, and we talked along for quite a bit; I asked him what shape the sheep were in, and what kind of range he had, and so on.

Q. Who was present at that conversation between the two of you?

A. With the exception of the time we went from the store over to the saloon and back, Mr. Bohannan was with us.

Q. When you first saw him come along the road in a wagon, you said it looked like a sheep outfit to you? A. Yes.

Q. The appearance of the wagon gave you that impression?

A. Yes, I had seen so many wagons, it looked to

(Testimony of Harland Acree.)

me like a sheep wagon.

Q. And the sheep were not yet in sight?

A. No, sir.

Q. And when you first directed him, I understand that you gave him two different courses; is that correct?

A. Well, when I first directed him I didn't know—yes, that is correct.

Q. And after you had given him the first direction, you asked him [141] if he had sheep, and he said yes? A. Yes.

Q. And after he gave you that information you then directed him a different course?

A. I think I told him that I would advise him to take his grub-wagon down the road, that I didn't think he could get across the railroad track with his grub-wagon down there, it was a high embankment; I didn't think he could get across the track with his grub-wagon; but I told him he could drive down to the lake and camp there that night—a good road—and come back with his grub-wagon and go out the other way on the road, and advised him to keep his sheep down there where it was good feed.

Q. What side of the railroad track would that be on?

A. That would be on the south side of the railroad track.

Q. The second course you gave him was on the south side of the railroad track? A. Yes, sir.

Q. And when he first pointed to the water down

(Testimony of Harland Acree.)

by the pump-station, what did he ask you about that water?

A. He asked me if it was rain-water or cyanide water.

Q. And what did you reply?

A. Why, my reply was, "I think it is rain-water; it has been raining down here, but I would not take a chance on it if I were you."

Q. And then did he ask you with reference to the second course, and the water that was on the second course; did he ask you if there was cyanide down there at that lake? A. Yes, sir.

Mr. SANDERS.—I think that is leading, if your Honor please.

Mr. BROWN.—Well, it is leading.

Mr. SANDERS.—The witness has never testified heretofore about that, as I understand; that is his conclusion.

Mr. BROWN.—That may go out.

Q. Did he ask you anything further in reference to the water that was in the lake where you said you had hunted the ducks?

[142] A. Well, as I stated before, he asked me if it was good water, and I told him that it was; he asked me the condition of the lake for watering stock in it, if it was boggy; I told him it was perfectly hard, the banks were good and hard, no chance to bog anything in there, the water was only about knee-deep, no chance about drowning.

Q. Did he make any inquiry in regard to that

(Testimony of Harland Acree.)

water, as to whether water from the mills could get into it?

Mr. SANDERS.—I object to that as leading, if your Honor please. The question suggests the answer. The witness has testified fully in regard to all those things, and nothing was said, directly or indirectly, to the effect that the water in the lake contained cyanide.

(By direction the reporter reads the question.)

The COURT.—I think he has already testified to that. You may ask the question if you wish, but I think he has already testified to that.

Mr. BROWN.—You may answer the question.

WITNESS.—What was the question?

(The reporter reads the question.)

A. He asked me where the water in the lake came from; I told him it came from Peavine, and, as I stated before, in talking of the water that went into the lake, that there was no chance for the water below the mill—we were talking about Los Kamp's pump-station—the small lake and the large lake, you understand, and he asked me what water that was out on the flat on the other side of that, and I told him that was Peavine, and he says—I think he says, "Where does this water in the lake come from?" and I says, "It comes from Peavine, Peavine is the big lake you see out there; it is an alkali flat where it spreads out there, there is no chance to mix the two, [143] you can see the sand bar there.

Q. Was there anything further said between you as to how he should manage the sheep in the event

(Testimony of Harland Acree.)

that he did not go over on the north side of the track?

A. No, sir, I never discussed the north side of the track with him at all, in regard to taking his sheep over there, only after he crossed the track coming up from the lake, you understand, that would be on the north side following the creek up.

Q. By going the route on the south side of the track, how would the water facilities be from Millers, through that route up to a point about six miles from Crow's Springs, as compared with the route down around by the pump-station, and then toward Crow's Springs?

A. Well, there would be more water between the pump-station and the route of perhaps six miles of Crow's Springs, but it would not be as good a country to my judgment to drive stock through, because it was simply wide flats of water; going to the lake and out the other way, he would have good feed, a good grassy flat through there, and would follow these creeks along, because it begins to narrow up, after they get out a mile or two from Millers, they begin to narrow up and run in a channel more.

Q. Mr. Acree, are you familiar with the roads in Nye and Esmeralda counties? A. Yes, sir.

Q. Were were you born?

A. I was born in Austin.

Q. How old are you? A. Thirty-one.

Q. Lived in Nevada all your life? A. Yes.

Q. And in those southern counties?

(Testimony of Harland Acree.)

A. Yes, sir.

Q. State whether there is any old road coming from the north into Millers, any old road existing before Millers was established, that comes right into where the town of Millers now is, or anywhere near it?

A. No, there is not, or there wasn't before Millers was built.

[144] Q. Is there an old road coming from the north that strikes across the railroad track some distance from Millers?

A. Yes, sir; which side of Millers, east or west?

Q. Well, is there one on the east side of Millers?

A. Yes.

Q. How far from Millers does it cross the track?

A. About seven miles east of Millers.

Q. What is the first one west of Millers?

A. I don't know where it crosses the railroad track, but it is better than ten miles.

Q. Now, the one that crosses the railroad track seven miles east of Millers, what road is that, and what points does it lead to up north?

A. It is a road that was built for travel from the northern countries, Smoky Valley, Reese River, Peavine, Cloverdale; that went into southern Klondike, it was an old mining camp twelve miles south of Tonopah, and which was worked before Tonopah was discovered.

Q. And the road west of Millers, that crosses the railroad track about ten miles west of Millers,—what points does that road lead to at the north?

(Testimony of Harland Acree.)

A. That is the road, what is known to people in that country as the Candelaria-Belmont road.

Q. You are familiar with the different localities in southern Nevada where mining is conducted, and where milling is prosecuted?

A. A good many of them, yes.

Q. What different places do you know about in southern Nevada beside Millers?

A. Millers and Tonopah, Blair—the Merry Mine at Blair—Rhyolite, Manhattan, Round Mountain, Berlin.

Q. Are those cyanide plants at those different places?

A. All with the exception of Round Mountain and Berlin, though Berlin is now.

Q. What material is the dam at the Desert Mill constructed of?

A. Why, just slimes as they come from the mill, shoveled up there, I should judge.

[145] Q. Mud?

A. Slimes as they come from the mill.

Q. What efforts are made by the Desert Power and Mill Company to keep up that dam, and keep it intact?

A. Well, as my work has called me around that dam at different times, I have always saw men working on it, and in and around it; my stable is within fifty yards of it on one side, and I have always saw men working on it.

Q. And of what materials are the dams at the other mills constructed?

(Testimony of Harland Acree.)

A. At Blair they have no dam, the Blair Mine,—the Merry Mine at Blair. Manhattan they have no dam, with the exception of the White Caps, they have a small dam there. At Berlin they have no dam; the tailings from the old mill, they dam them, and cyanide them later on, and they are now cyaniding them without any dam.

Q. How about Tonopah?

A. The mining companies in Tonopah have no dams that they hold, themselves; they are turned loose down the canyon, and the people there have dammed them up and leached them, worked them; but they run down the canyon to my knowledge for eleven miles below Tonopah.

Q. How close to Millers, to your knowledge, do the Tonopah tailings come?

A. The closest point is within about a mile and a half.

Q. How about Goldfield?

A. I am not very familiar with the slime pond at Goldfield; I have only been over that line once.

Q. Now, the different ponds that you know about, what materials are they made of?

Mr. SUMMERFIELD.—If your Honor please, I desire to enter an objection at the present time to this line of testimony, upon the ground that in a case of alleged negligence proof of the general custom over a country, is inadmissible. The question is whether or not in the handling of a deadly agency, such as is admitted in this [146] case, such a degree of care was exercised by the company handling

(Testimony of Harland Acree.)

it proportionate to the dangers involved in handling it, so that a Court or jury could say from all the evidence in the case whether a proportionate degree of care was exercised in that particular case. And proof of a loose general custom is inadmissible in any negligence case, regardless of whether it involves the case of handling a deadly agency or not.

Mr. BROWN.—This is not proof of a negligent custom; this is going into the routine business of the industry, to show to the Court the nature and incidents of how it is conducted. We expect to show by this testimony, responsive to our allegation, that we were diligent and careful in maintaining our dams; that we pursued a course of conduct that was the best that could be pursued under the circumstances and under the conditions, and to show that that is the course of the whole industry through that country. It seems to me responsive to the issues framed here. The purpose is not to justify our course of conduct by the negligent custom of somebody else—we do not contend we are proving a negligent custom of somebody else; we disclaim this testimony is proving a negligent custom. This testimony is for the purpose of showing your Honor the course of conduct pursued by the industry, and advise the Court of the nature.

The COURT.—(After discussion by counsel.) I will let the testimony go in subject to the objection, but the burden will be on you, Mr. Brown, to convince me that it can be considered at all.

Mr. BROWN.—Very well.

(Testimony of Harland Acree.)

Mr. SUMMERFIELD.—I will just take a *pro forma* exception on the grounds stated in the objection.

(By direction the reporter reads the question.)

A. Why, the pond at the White Caps mill in Manhattan is made of the [147] tailings as they come out of the mill, but it is only a very small pond; it is turned loose. It was made to try to save them, to get an extraction from them later on, then they are turned loose and run on down the canyon. And as I said before, at Blair they have no pond; they simply run them out over the country there, and down over a marsh, and they spread out there over a length of ground a mile and a half or two miles wide, and in some places twelve or fifteen feet deep.

The COURT.—(Q.) Are those discharges from cyanide tanks?

A. From a cyanide mill. How I know they are twelve or fifteen feet deep, we have a power line going through them, and in places they were up within eight feet of a fifty thousand volt line, and we have had to raise those poles to get them within a lawful distance.

Mr. BROWN.—(Q.) During the time that you have been at Millers, what can you say as to whether the livestock men have been in there with their herds, or whether they have avoided that country.

Mr. SUMMERFIELD.—I object to that as immaterial to any issue in this case whatever, unless counsel can indicate it, if there is any point of relevancy.

(Testimony of Harland Acree.)

Mr. BROWN.—We have alleged in the answer, if the Court please—

The COURT.—If you have a point to make in that, which you think has sufficient merit to present to the Court, I will let you put it in, but I will say just as I did about the other, and Mr. Summerfield will have an exception now to the ruling.

Mr. SUMMERFIELD.—I will take an exception *pro forma*. Of course, it might be connected in some way.

(By direction the reporter reads the question.)

WITNESS.—During the time I have been there there has never been anyone in there with a herd, and to my knowledge they have used [148] every precaution to avoid—

Mr. SUMMERFIELD.—Wait a moment. We move to strike that out as not being responsive at all.

The COURT.—That may go out.

Mr. BROWN.—(Q.) You have not seen any in there? A. No, sir.

Mr. BROWN.—You may inquire.

The COURT.—(Q.) Did you say no other herds of sheep and cattle, or just no other herds of sheep?

A. No herds of any stock.

Cross-examination.

Mr. SANDERS.—(Q.) Mr. Acree, you have been at Millers since May, 1913? A. Yes, sir.

Q. And you have been engaged by the Nevada-California Power Company? A. Yes, sir.

Q. Your duties in that respect are what?

(Testimony of Harland Acree.)

A. I have charge of the substation at Millers, and of all lines leading out of Millers, and of all town wiring in Millers, with the exception of wiring for the two different mills.

Q. With the exception of the wiring of the Belmont Mill and the Desert Power Mill?

A. Yes, sir.

Q. And you were engaged in that business on the 4th of February of this year? A. Yes, sir.

Q. And you feel that you are pretty familiar with the conditions, not only in Millers, but also in the surrounding country that you have testified about?

A. What conditions do you refer to?

Q. I mean as to water and as to roads and as to directions, and to courses, and everything about the country.

A. I know all the roads and water places in the country.

[149] And you have been familiar with that feature, the conditions of the country, for a number of years? A. Yes, sir.

Q. And especially the northern part, or what we call the northern part or section of Nye and Esmeralda counties? A. Yes.

Q. You were born and raised at Austin?

A. Born and raised at Austin.

Q. And your occupation has been directed to the business interests of the northern part of Nye and Esmeralda and Lander counties? A. Yes, sir.

Q. Now, you say that this is the first conversation, or the conversation you had with Mr. McGarry

(Testimony of Harland Acree.)

took place at Dale's store; where is that store located with reference to the road leading out north of Millers?

A. The road leading north of Millers, coming to Crow's Springs, do you mean?

Q. Any road getting out of town, going north; there ain't but one road that gets out of there, is there?

A. Only one road that gets out of Millers, it doesn't go north.

Q. It goes outside of town in a northerly direction?

A. It goes right around the corner of Dale's store.

Q. It don't go through people's houses to go in a direct route, it has to take a little roundabout course, but it is the direct road that leads out of Millers?

A. Yes.

Q. And that is the road that these sheep fell on?

A. Yes.

Q. And it is the only road that you can get north on? A. Yes.

Q. Coming back then to the question, Mr. Acree, the only road you can get out of Millers, is the road these sheep fell on to the north? A. Yes, sir.

Q. Well, now, at this Dale's store, that is the post-office, isn't it? A. Yes, sir.

Q. About how far would you estimate that post-office to be from [150] the point where these sheep were killed—just generally, you need not give the exact distance.

A. Oh, I should judge half a mile.

(Testimony of Harland Acree.)

Q. Now, you say that you had that conversation with Mr. McGarry along about nine or ten o'clock?

A. Between nine and ten o'clock.

Q. Between nine and ten o'clock on the morning of the 4th? A. Yes, sir.

Q. And your brother in law, Mr. Bohannon, was present with you at that conversation? A. Yes.

Q. And you had a general conversation with him before you made yourself known, or he made himself known to you? A. Yes, sir.

Q. Now, it was in front of the store that you had this conversation?

A. With the exception of the time that we walked over to the saloon and back.

Q. And he talked with a man by the name of Cranda before addressing his remarks to you?

A. For a very few minutes.

Q. Who was Cranda, do you know who he was?

A. Oh, he is a fellow that has been hanging around Millers there for a few months.

Q. Operated in a saloon for a while?

A. I beg your pardon.

Q. Was he a bartender there for a while?

A. Not to my knowledge; he worked for me a few days on the power line.

Q. Now, McGarry was asking Cranda to direct him to Mina? A. Yes.

Q. And he said that you would be a better man?

A. No, a man by the name of Lacy was standing by Cranda, and he heard him ask Cranda, and Lacy says, "Here is a man who can tell you."

(Testimony of Harland Acree.)

[151] Q. And then you proceeded to direct him out of Millers to Mina? A. Yes, sir.

Q. And there was but one way of direction to get him out of Millers, was there, from the point you were standing? A. With a wagon.

Q. With a wagon; and that was to take what we call the main travelled road, wasn't it? A. Yes.

Q. That main travelled public road to get to Mina from the point you were directing him was this road that led out where the sheep were killed, beyond that point and taking to the left?

A. Well, there were several places that I directed him to go to the right and to the left—which road to take.

Q. But every direction converged into one common way to get out? A. Yes.

Q. These roads to the right and to the left were the roads that had been formed there by dodging the bad places on the desert?

A. No, the first road I told him to take,—to take the first left-hand road when he got around the corner of the pump-station; the right-hand road is one that was built through there by the Power Company in 1900 and—well, seven years ago; and the next one I told him, to take his right-hand road, was four or five miles where another road branched off—a cross-road.

Q. Do you mean to say that is what we call the Reno road, with a sign there?

A. No, there is no sign there.

(Testimony of Harland Acree.)

Q. There is no sign there?

A. Nothing of that kind.

Q. Now, having given him those directions, he mentioned Crow's Springs, you say?

A. Well, I think I mentioned Crow's Springs.

Q. And you also directed him how to get over there? A. Yes.

Q. That would be the same course that you directed him to go to Mina?

A. Yes, Crow's Springs is on the Mina road.

[152] Q. The first time, then, that your attention was called to any question as to water, after the sheep were mentioned, was by Mr. McGarry, was it?

A. How is that question again?

Q. The first time that the water was suggested, after you said to him "You have got some sheep," as you stated,—the first time that the water was mentioned was by Mr. McGarry? A. Yes, sir.

Q. And he asked you, "What is that water over there?" A. Yes, sir.

Q. Pointing in the direction of the place where the water stood over in the flat?

A. No, he asked me what that water was down there.

Q. Down there, I beg your pardon—down there.

A. Yes; there was a lot of water there; the way he spoke to me, he says, "What is that water down there?"

Q. "What is that water down there," and you told him it was rain-water?

(Testimony of Harland Acree.)

A. I told him it had rained in there during the rain.

Q. It had rained in there during the rain. You have got a stable over there pretty close to it, haven't you? A. No, sir.

Q. Where is your stable located with reference to that water?

A. My stable is—if that place is a half a mile from Millers, my stable is almost half a mile from the water.

Q. You said something in your testimony somewhere about your stable, I didn't know you had one; you said somewhere that your stable was located down there.

A. I said my stable was located within fifty or sixty feet within the bank of the mill.

Q. Fifty or sixty feet of the mill, close to the slime pond? Now, you are pretty familiar with the condition of the water all around there? A. Yes.

Q. And it was your judgment this was rain-water?

[153] A. No, I don't think that I—

Q. Wait a minute; you say it was your judgment. Mr. BROWN.—Let him answer.

Mr. SANDERS.—That calls for an answer, yes or no. It was your judgment from your knowledge of it, that it was rain-water? That calls for yes or no.

A. No, it was not my knowledge that it was rain-water.

Q. The question is not your knowledge; the question is your judgment. A. No.

(Testimony of Harland Acree.)

Q. What was your judgment?

A. That the water had come in there during the rain.

Q. Then, of course, naturally, you thought it was rain-water; anybody else would think so.

A. No, I did not.

Q. If it came in there from the rain, and it accumulated there, how long had it been standing there?

A. Well, I don't know how long it had been standing there; it had not been there very many days.

Q. Had there been any rains previous to that time?

A. Lots of them.

Q. And the water was standing all around there?

A. Yes, but not on that particular flat.

Q. And it was standing there several days before these sheep got in? A. Well, a few days.

Q. And it had accumulated there during and since the rain had fallen? A. Yes, sir.

Q. Have you ever watered your horse there?

A. No, sir.

Q. Had other people watered their stock there, anybody else that you know of?

A. I never saw anybody water their stock there.

Q. Where did you water your horse?

A. I watered my horse at the watering-tank on the road, but a [154] hundred yards from my stable.

Q. Did you ever see any travellers across there let their horses stop and drink at this point?

A. No, sir.

Q. Had you ever seen any stock-men passing stock

(Testimony of Harland Acree.)

through there let them drink around in those standing places of water? A. No, sir.

Q. Then, as far as you know, this was water that had been brought there and put there by the recent rains? A. Yes, sir.

Q. Now, you spoke of some lake, going by some lake or something; where is that lake with reference to Millers, what side of the town is it on?

A. It is on the south side of the town, southwest of Millers, in an air-line, it is three miles from Millers.

Q. Then the direction that you gave from Mina and Crow's Springs, how much would that throw a man who was taking a direct course to get out of Millers, on to Crow's Springs, out of his road?

A. Oh, perhaps four or five miles.

Q. Now, that lake is composed of the waters, as you stated, from Peavine, and what other place was it? A. Cloverdale—Cloverdale Creek.

Q. In other words, the Peavine water and the Cloverdale water, come down on the other side of this point where the sheep were killed? A. Yes, sir.

Q. To the left, on the east side of the road, or the north?

A. North, to the right, on the north side of the road.

Q. And about how far is it from this point where the sheep were killed?

A. To where Peavine comes down?

Q. Yes. A. A mile and a half.

Q. Now, this water could not possibly have come

(Testimony of Harland Acree.)

down then from Peavine, as you have stated?

A. This water, where the sheep were killed?

[155] Q. Yes. A. No, sir.

Q. Had you ever, at any previous time in your knowledge of that country there, noticed or witnessed quite as much water as had been accumulated there at that point and the surrounding country, as there was about this date? A. No, sir.

Q. It was quite a rainy season, was it not?

A. Yes, sir.

Q. Now, assuming that to have been rain-water, as you stated the conditions, could that water have been impregnated with cyanide solutions in any manner, or in any way, or from any source, other than that the solutions must have flowed down to the point from the settling pond of the company?

A. Well, I don't know.

The COURT.—Read the question, please.

(The reporter reads the question.)

WITNESS.—I answered that I didn't know whether they could or not.

Mr. SANDERS.—(Q.) Was there any other settling-pond there from which these solutions could have come? A. No, sir.

Q. None that you know of? A. No, sir.

Q. How did this man McGarry get into the town, you said you noticed him before?

A. He drove down the road coming from the Tonopah road.

Q. What did he purchase in that store, do you

(Testimony of Harland Acree.)

know? A. I don't remember.

Q. Did you see him do any trading in there?

A. Yes, I did; I remember he asked for his mail—he got some mail.

Q. He took his wagon and crossed to the south?

A. No, I never saw him leave the store at all.

Q. Had you noticed his wagon before that time?

A. Before I saw him come into town?

Q. Yes. A. No, sir.

Q. When did you first notice the wagon?

[156] A. As he was driving up to the store, coming down the road.

Q. After he did his business in the store, he crossed to the south?

A. No, when I left the store his wagon was still in front of the store.

Q. And you advised him that the south side of the road was a good place for the sheep?

A. Yes, sir.

Q. Because of the feed and the range?

A. Feed and water.

Q. And he was particular to inquire about the condition of the water in the lake, was he, as to whether or not it was safe for sheep or stock?

A. No, he asked me where it came from.

Q. He was diligent in that, was he not, to try to find out as to whether he could get his sheep into it without losing any?

A. No, he simply said, "Where does the water in the lake come from, and what kind of shape is it in?"

(Testimony of Harland Acree.)

Q. Your reply to that was that it was not boggy, and that it was good water, and that it was about knee-deep, and was all right? A. Yes, sir.

Q. Inferring, then, that the only purpose and use of his inquiry was to see whether or not it was a good place to water his sheep, is not that a fact?

A. How is that?

Q. The only purpose of his inquiry, as far as you could see from his conversation and inquiring about it, was to find out a good place for watering his sheep? A. Yes, sir.

Q. That was his point clearly at the store, trying to find out some suitable place to water?

A. Well, he seemed to be wanting to find out the road to Mina, and then asked about the water.

Q. And you really told him that there was more water on that road from the pump-station over there than there would be on the south side? A. No, sir.

Q. How was it; was there more water on the north side?

[157] A. I didn't tell him that there was.

Q. Didn't you discuss that? A. No, sir.

Q. Well, by going on the south side from Millers to Crow's Springs, that there was more water on that pump-station side, and it was not good driving, as I got you down, because of the condition of the water?

A. I think I said that in answer to a question asking me which would have been the best way for a man to take sheep through there.

(Testimony of Harland Acree.)

Q. You thought the south side was the best, because there wasn't so much?

A. Better country to drive sheep through, wasn't so wet and spread out; it was a better country to drive sheep through.

Q. About that cyanide down there; you stated you didn't know of any herding or grazing in the neighborhood of that vicinity; what is the character of the land as to being vacant, unoccupied, or uninclosed, or what? A. Well, it was uninclosed land.

Q. And it is for an indefinite number of miles all around in that country, uninclosed, is it not?

A. Yes, sir.

Q. And grazing cattle from north of Millers occasionally come down there, don't they, to Millers?

A. I never saw any at Millers.

Q. Have you seen any of them killed there by cyanide? A. No, sir.

Q. Do you know of any others?

A. I have understood there were some.

Q. Don't you know that Jim Wood lost cattle there at the time these sheep were killed?

A. I understood they were; I never saw them.

Q. You know very well what goes on there?

A. I wasn't at home during that time.

Q. You happened not to be home?

[158] A. During the time these cattle were killed.

Q. You work at Tonopah, too, do you not?

A. Yes.

(Testimony of Harland Acree.)

Q. Don't you know just after, or shortly after the killing of these sheep, that the Pioneer Dairy Company lost some cows off their dairy right below Tonopah, from that?

Mr. BROWN.—I object, unless he knows it of his own knowledge.

WITNESS.—Yes, I do.

Mr. BROWN.—You know it of your own knowledge? A. Yes.

Mr. BROWN.—I move to strike it out on the ground it is subsequent to the date of inquiry here, did not occur at Millers, occurred at another community, at Tonopah, and not responsive to any issues in this case.

Mr. SANDERS.—It is in line with the direct examination of the witness, how the cyanide was run, and I have the right on cross-examination to show the effects of it.

Mr. SUMMERFIELD.—I do not understand that the objection goes to this particular place, but previous to that time, and prior to that, he had some knowledge of cattle of Woods being killed; I think that would be entirely admissible for the purpose of imputing knowledge of the defendant company. I do not understand the objection extends back to that.

The COURT.—If you have a point to make, I will let it go in, but it will be admitted subject to the objection, and there will be an exception to it.

Mr. SANDERS.—I do not care to make a point on

(Testimony of Harland Acree.)

it; it was simply in accord with the direct examination, and I didn't want it to pass unnoticed.

Q. Now, Mr. Acree, you say that you are familiar with the roads of that section? A. Yes, sir.

Q. And have been for the past thirty-one years?

A. Hardly.

[159] Mr. SUMMERFIELD.—He said he was thirty-one years old.

Mr. SANDERS.—(Q.) You are thirty-one years old; you are, though, pretty familiar with all those roads? A. Yes, sir.

Q. Now, Mr. Brown has asked you if there is any old road from the north into Millers; did you understand what he meant by "any old road," when in your answer you stated that there was not?

A. I think that question he asked me, was there any old road coming from the northern country into Millers, and I answered, no.

Q. Well, now, what do you mean by an "old road"?

A. Well, in his question he asked me, if I remember rightly, was there a road coming—an old road that was there before Millers was built, and I answered no, there was no road through where Millers is now before Millers was built.

Q. You have known Millers since its establishment? A. Yes.

Q. Been familiar with the roads running in and out of it? A. Before it was built.

Q. Before it was built, were you? A. Yes.

Q. And since that time, have you been?

(Testimony of Harland Acree.)

A. Yes, sir.

Q. You state that there was no road at all into Millers from the northern section until it was built?

A. Yes, sir.

Q. Since that time, has there not been a highway or public road running north from Millers?

A. Yes, sir; there is now.

Q. And hasn't there been ever since it got to be a town?

A. I could only say up to the time I went to work there.

Q. Well, you testified to-day, heretofore, that you say you know there is no old road runs into it.

A. I say I know there was no old road running into it before Millers was built.

Q. Before Millers was built? A. Yes.

[160] Q. Since that time, do you know whether there has been any kind of a road built out there?

A. There is a road since Millers was built.

Q. Don't you know the road has been there ever since the town of Millers was established?

A. No, because I never went in on that road; the fact of the matter is, I know the road was built within the last two or three years.

Q. This particular road where the sheep were killed? A. Yes.

Q. When did you first find that out?

A. During the Republic excitement.

Q. You don't mean to tell me that road was only put in there since this Republic excitement—be careful on that.

(Testimony of Harland Acree.)

A. If you will remember, two years ago when we were going campaigning, we wanted to go through Millers to get out through the northern country, and couldn't go out that way.

Q. We made a mistake in going through Millers.

A. No, Billy wanted to take the left-hand road, and we took the right-hand road, and got into the sand, and there was no road out of Millers at that time.

Q. Well, I don't want to take the witness-stand with you on that proposition.

A. I am simply discussing it with you.

The COURT.—(Q.) Your testimony is that this road was built within two years? A. Yes.

Mr. SANDERS.—(Q.) That is your positive testimony?

A. To my knowledge, it was built within two years.

Q. That the only outlet to the north that the people of Millers had was this road where the sheep were killed, and that, as far as you know, has only been there for a period of two years? A. Yes.

Q. And you want your testimony to stand that way?

[161] A. Yes, that is, going north.

The COURT.—(Q.) And this was the only road going north; do I understand that also, that this road where the sheep were killed has been constructed within two years, and that it is the only road going north out of Millers? A. Yes.

(Testimony of Harland Acree.)

Mr. SANDERS.—(Q.) Who put that road in?

A. I don't know.

Q. Who has worked it since, who has kept it up?

A. It has not been kept up.

Mr. BROWN.—That would be hearsay, unless he knows.

Mr. SANDERS.—Well, he says it has not been kept up.

Q. Do you know whether it has been kept up or not?

A. Well, in the length of time I have been at Millers, I have never seen any work done on it.

Q. Now, that old road that you speak of, how often had you traveled it before you got this job at Millers?

A. I think I am safe in saying at least a dozen times.

The COURT.—Now, you are speaking about the old road, where is that?

Mr. SANDERS.—I am going to try to place that just in a minute.

Q. Now, tell the Court where that old road is with reference to the road you say was constructed out of Millers years ago?

A. That old road north of Millers.

Q. Is that the road you call the old road?

A. Northeast of Millers, that is what I refer to, and supposed you referred to.

Q. I am referring to the old road that you are referring to, I want to get how far that road is out from Millers with reference to this road that you say

(Testimony of Harland Acree.)

was put in there two years ago.

A. The nearest point that the old road going north up that valley comes to Millers is six miles.

[162] Q. Six miles? A. Yes.

Q. Then is that the road called the old Klondike road, that you say was used before the discovery of Tonopah? A. Yes, sir.

Q. That road then came in from where?

A. Came in from San Antone to Montezuma Wells, and Montezuma Wells is just six miles from Millers by a surveyed line.

Q. And from that point it took a southeasterly course? A. Southeasterly course.

Q. Over to what is called Klondike? A. Yes.

Q. Passing over what is now the Tonopah-Goldfield Railway at a point about six or seven miles east of Millers? A. Yes, sir.

Q. And it was about six miles north of Millers that it bore in this southeasterly direction?

A. Yes, sir.

Q. That would make the position of the old road then with reference to the location of Millers,—it would be an angle, wouldn't it, a direct right angle would be formed?

A. Well, it would not be a right angle.

Q. What kind of an angle would you call it?

Mr. SUMMERFIELD.—An obtuse angle.

Mr. SANDERS.—If it is six miles north.

A. Yes, it would be almost a right angle.

Q. If it comes down in a southeasterly direction, and passes the railroad track seven miles east, and

(Testimony of Harland Acree.)

Millers being on the railroad track, would put it right at the angle, and be a right angle, would it not?

A. Well, it would be—yes.

The COURT.—I wish you would show just what you mean there on the blackboard, Mr. Sanders.

Mr. SANDERS.—My idea would be this, what I am trying to get would be an angle. Here is Montezuma Well, where the old road is, where it shoots across in a southeasterly direction; you have testified [163] that road crosses the railroad seven miles east of Millers? A. Yes, sir.

Q. Then at this point where it leaves up there at the Wells, if it is six miles north of Millers, that would put Millers right in the center of the angle?

A. It is more of a "V," Montezuma Wells is more northeast of Millers.

Q. It would be then more this way (draws on blackboard). Now, you say this was the old road, and this road leading into Millers, which you have known for two years, that meets what kind of a road coming from Tonopah and Goldfield?

A. That runs right up along the north side of the railroad track from Millers to Tonopah.

Q. From Millers to Tonopah it runs right along the railroad track, and also from Goldfield, doesn't it,—the public road? A. Yes.

Q. So if it is in evidence that these sheep came on that Tonopah road and the Goldfield road leading into Millers, they travelled the main public road to get in there?

(Testimony of Harland Acree.)

A. The sheep didn't come on the road, the wagon did.

Q. Well, the wagon came on the main public travelled road into Millers, and went out the main public travelled road, as far as you know?

A. Yes.

Q. Now, that road there that you spoke of a while ago, don't you know that that road is never travelled by any one at the present time? A. Which road?

Q. From the point where it crosses the Goldfield railroad, the old Klondike road, cutting across to Montezuma Wells? A. There is some travel on it.

Q. Very seldom ever travelled, isn't it?

A. Well, there has been more travel on it this fall.

[164] Q. Well, do you know of anybody ever taking that road? A. Yes, sir.

Q. Well, who?

A. Well, in the last two weeks I have seen three or four teams on that road.

Q. What kind of teams?

A. One a four-horse team, another twelve animal team.

Q. Where were they going to, do you know?

A. The twelve animal team was going to Liberty.

Q. Where were they coming from?

A. Tonopah.

Q. Ain't you mistaken in the road; isn't there a road running right along in this direction from Tonopah (draws on paper); isn't that the Tonopah road where those black lines are drawn on the paper? A. Tonopah road to where?

(Testimony of Harland Acree.)

Q. To Liberty or Montezuma.

A. Oh, from Tonopah, but the teams I saw took this road I just told you about.

Q. The old Klondike road?

A. The old Klondike road.

Q. If they were going to Tonopah, what in the name of common sense would they be down here seven miles from Tonopah, when they could go right to it?

A. Because the slime ponds have covered up this road, and you can't cross it with a team.

Q. Then we will say that the road that came in from Montezuma road and Liberty road, has been abandoned—the old San Antone road that runs to Tonopah has been abandoned? A. Yes.

Q. Then the nearest way for people to get from Tonopah to that northern country, would be to come down this old road, and go across, or come down by the way of Millers, and go across?

A. There is another road in there that is travelled some.

Q. It would be cutting across the desert there?

[165] A. It is a straight road from Tonopah out.

Q. Isn't it a fact that practically all of the travel from Goldfield to Tonopah is by way of the town of Millers, out north? A. Yes.

Q. That is the most generally travelled road by all of them? A. Yes.

Q. You spoke of the condition of that country there on the campaigning trip; because of the immense sand that is over and above there, the big

(Testimony of Harland Acree.)

heavy sands in those two roads, that has influenced the general public to a more or less extent, to take the better road around by Millers, to make the best time? A. Yes.

The COURT.—(Q.) Does that road by Millers go through Montezuma Wells? A. No, sir.

Mr. SANDERS.—(Q.) It does not? A. No.

Q. Then the road running north of Millers don't touch Montezuma Wells? A. No, sir.

The COURT.—(Q.) The road you say is the most travelled road toward the north is the one on which the sheep were killed, do I understand you?

A. Yes, sir.

Mr. SANDERS.—(Q.) Well, now, Mr. Acree, I don't understand that Montezuma Wells proposition. For my own information, what is that well there those boys from Tonopah, you know, the old ranch up there so many people have tried to make a go of? A. That is Samonsel's station.

Q. You know that fellow that used to sell milk in Tonopah, he is the one I have reference to, who started to make a ranch out of it?

A. That is the same place; you might call it Midway, the old-timers call it Samonsel's station.

Q. You mean east from Millers?

A. That is Samonsel's station.

Q. Now, Montezuma Wells is located with reference to that which way? [166] A. South.

Q. This way next to Millers?

A. South, a trifle southeast of Simonsel's station.

Q. And this road, while it don't pass Montezuma

(Testimony of Harland Acree.)

Wells, it is in the same direction to go out to San Antone and Montezuma Wells and Reese River?

A. Yes.

Q. That road is the outlet for Tom Bell and the Cloverdale people and Ione people, they all come down this way and take this road we are talking about to haul their stuff in, and also with their automobiles?

A. Yes, sir.

Q. How many horses do you keep? A. Two.

Mr. SANDERS.—That is all.

Mr. SUMMERFIELD.—I was not clear about one point, if I may ask. Is there any objection to my asking a few questions?

Mr. BROWN.—No.

By Mr. SUMMERFIELD.—(Q.) Mr. Acree, before two years ago, in travelling from Tonopah and Goldfield to the northern country, how close did the travelling public go to Millers, using that road?

A. If they were going north into Smoky Valley or Reese River country they would go within six miles of Millers; if they were going,—starting across the country coming out at Mina, they would go within two miles of Millers.

Q. Now, before this particular road was constructed, which you have testified according to your recollection was constructed about two years ago, how did the people of Millers get out to go north, what road did they take?

A. They took the road up along the railroad track, this road from Tonopah to Millers.

Q. Then would they have to go up six miles in.

(Testimony of Harland Acree.)

order to strike that road to go north?

A. No, there was a road built in there about six years ago, a kind [167] of a road, it is almost impassible from Millers—built by the power company.

Q. Do you know whether or not, Mr. Acree, as a matter of fact this particular road where the sheep were killed was built by the power company?

A. No, the road where the sheep were killed was not built by the power company.

Q. When I say the power company I mean the defendant company in this case, the Desert Power and Mill Company. A. I don't know.

Q. You don't know? A. No.

The COURT.—(Q.) The road in a direct line going north from Mina within two miles of Millers, is east or west of Millers?

WITNESS.—It is north of Millers. Will you let me draw you a little sketch? I think I can make myself clear.

(Witness draws sketch on board of which the following is a copy.)

(Testimony of Harland Acree.)

[168] WITNESS.—This is Montezuma Wells (indicating); the road that Mr. Sanders asked me about, or that Mr. Brown asked me about, that crosses the road six miles east of Millers at Montezuma Wells, coming off in this direction, going to Klondike; there is a road from Tonopah coming down like this (indicating); it joins this road almost at Montezuma Wells; the old stage road from Tonopah to Mina and Montezuma Wells is six miles from Millers. There is a road that comes out from Tonopah, crosses through here, going to Crow's Springs, at a point about two miles from Millers.

The COURT.—(Q.) That goes on to Mina?

A. This goes on to Mina; this is the original road from Sodaville to Tonopah. Then there is a road from Millers that comes out around from the pump-station, and joins this road here; this is the road I said has been built within the last two years, this piece of road here (indicating); and then there is a piece of road that leads off up like this, taking in that northern country.

Mr. SUMMERFIELD.—(Q.) Will you just look at that map and see if that refreshes your recollection any, this is exhibit "B." (Hands to witness.) I think I see the difference, you have made your sketch with the top east instead of north.

WITNESS.—Yes. According to this map here there is a road east going out there, but that is almost impassable. In looking at the map I thought this was the road that the power company built when they

(Testimony of Harland Acree.)

built the power line, but I know that this road I have just put on here goes in here south of Millers, it is a branch off of this road here (indicating).

The COURT.—(Q.) That is the Klondike road?

A. A branch off the Klondike road.

Q. Which runs off at Millers?

A. It does not come in at Millers; it runs off a little east of Millers. Then there is another road on this map here, from Millers. [169] that I put in. That road I know nothing about (referring to map); but there is another road from Montezuma Wells that crosses in this direction—the Candelaria-Belmont road. This road here is a road that was built by the power company; this is the old stage-road from Belmont and Candelaria; this is the original stage-road from Tonopah and Sodaville; and this is the road that was built from Montezuma Wells to go to Klondike.

Mr. SANDERS.—(Q.) What did the California Power Company build that road there for?

A. It is a road they built and we have used it since.

Q. Ran the power line out to Manhattan, by Liberty and Round Mountain?

A. Yes, it is almost impassable.

Q. And in fact the best road in the whole bunch you have described there is the road from Tonopah to Millers, or from Goldfield out there on up north?

A. Yes, sir.

Q. And that is the road that is usually travelled?

A. Yes, sir.

(Testimony of Harland Acree.)

Redirect Examination.

Mr. BROWN.—(Q.) The reference to the cows that were killed by cyanide at Tonopah was stricken out, but your answer in reference to some cows that were killed, owned by Jimmie Wood, is in the record; how many cows of Jimmie Wood's were killed?

A. I don't know.

Q. Do you know whether it was a few, or whether it was a great many?

A. I heard it was three.

Q. Did you hear the circumstances under which they were killed?

A. I understood that they came in there and got up in the slime ponds.

Q. They were strays, were they? A. Yes, sir.

Q. Did I understand you to say that there was more water on the [170] north side of the track than on the south side of the track; I am speaking now of the two different courses.

Mr. SUMMERFIELD.—What do you mean, the railroad track?

Mr. BROWN.—Yes. Did I understand you to say that there was more water on the course which would take him on the north side of the track than there would be on the south side of the track?

A. It was spread out over more country.

Q. Well, were there more drinking places on the north side than on the south side?

A. I don't think so.

Q. What do you mean by its being spread out; do you mean the ground was wetter on the north side

(Testimony of Harland Acree.)

than on the south side?

A. The ground was wetter—alkali flats out there, just a little water standing in them, not better drinking places.

Q. Where was the better drinking, the course on the north side of the track or the course on the south side of the track?

A. On the south side of the track.

Q. Now, I understood you to say on cross-examination, that the water at the pools was brought in there by the rain, and then twice in response to Judge Sanders, although he interrupted you once, you said “No, it is not my judgment that it is rain-water.” Will you explain to the Court, so the Court may understand what you mean by those two answers?

A. Well, he asked me if it was not brought in there from the rains, if it was not rain-water, and when I answered Judge Sanders, I kind of took from his question, hadn't it come in there in a freshet—been flooded in from some other place—and I tried to answer that it was just the water that had run down off the sides from this pool, perhaps from the sides below the mill, there is quite a slope there.

Q. What was your reason for saying to McGarry that if you were he you would not take a chance on it? [171—172] A. Well, we are always—

Mr. SANDERS.—I object to that; it calls for the conclusion of the witness. His reason for saying he would not take a chance on it is for the Court to infer from what the witness has already testified; and to call on him at the end of his examination as to what

(Testimony of Harland Acree.)

he meant by "taking a chance," I don't think is hardly proper.

The COURT.—The purpose of the testimony was to show notice on the part of Mr. McGarry, wasn't it?

Mr. BROWN.—Yes.

The COURT.—Then the only question would be what information Mr. McGarry would get from this statement?

Mr. BROWN.—I withdraw it.

Q. I understood you to state in one part of your testimony that the old north road was seven miles from Millers, and then in another place that it was six miles from Millers; will you straighten me out on that?

A. It is seven miles from Millers where the road from Montezuma to Klondike crosses the T. & G. Railroad, and it is six miles from Millers to Montezuma Wells; that would make it six miles in a north-east direction to that old road, and seven miles in an east direction, or easterly direction.

Mr. BROWN.—That is all.

Mr. SUMMERFIELD.—I think that is all.

(An adjournment is taken at 4 o'clock until tomorrow, Wednesday, November 18th, 1914, at 10 o'clock A. M.)

[713] Wednesday, November 18th, 1914.

Court convened—10 o'clock A. M.

[Testimony of Earl Bohannon, for Defendant.]

Mr. EARL BOHANNAN, called as a witness on behalf of defendant, having been sworn, testified as follows:

Direct Examination by Mr. BROWN.

Q. Will you state your name?

A. Earl Bohannon.

Q. Where do you reside at the present time?

A. Goldfield, Nevada.

Q. How long have you resided there?

A. Oh, in the neighborhood of two months.

Q. Did you ever reside at Millers?

A. Yes, sir.

Q. Did you reside there February 4th and 5th, 1914? A. I did.

Q. Do you know Harland Acree of Millers?

A. Yes, sir.

Q. Are you related to him? A. I am.

Q. What is the relationship?

A. Brother in law.

Q. Do you know where Dale's store is?

A. Yes, sir.

Q. And the postoffice? A. Yes, sir.

Q. Were you present at or near the postoffice on February 4th, 1914, when a conversation took place between Mr. Acree and William McGarry, who had charge of a band of sheep that came into Millers on that day? A. I was.

Q. Did you hear the conversation?

A. Yes, sir.

(Testimony of Earl Bohannon.)

Q. Will you state the substance of the conversation?

A. Well, as near as I can remember, it was in the forenoon, I could not say what hour, some time in the forenoon, nine or ten or eleven o'clock, that a number of us were standing there in front of Dale's store; we looked down and saw this wagon driving up the street, and someone said "Some movers, I guess—travellers"; and [174] Acree looked at me and he says, "It looks like a sheep wagon, doesn't it?" and I says "It looks that way." So McGarry came up then; he tied his team and came up on the porch where we were, and went in the store, I think, in the postoffice; Acree says, "Let's go in and see what is doing, maybe we can get a sheep for ourselves a mutton," so we went in and listened to the conversation, I don't remember just what it was, and came outside again; and McGarry inquired about the road across the Mina, wanting to take the sheep across that way to a winter range, I believe; some one was standing there—I didn't know many of the people there at that time—and he pointed out Acree as being the best man to see to show him the best road across the flat; so he came over and began talking to Acree, and he and I was standing there together; he inquired about the road, and Acree begin to point out down around the pump-station that was used then, going across the flat, by a good many, although lots of water—considerable water—in the flat at that time. McGarry asked if that was rain water down there or cyanide water; Acree laughed, and says, "Why, I

(Testimony of Earl Bohannon.)

wouldn't take any chances on it being cyanide water, possibly could be," no, I says to him myself, "I would not take any chances either"; so I think Acree spoke up then, and told him about the lake, or the man inquired if there was any other way, I don't just recall that, but I believe that he did; Acree told him there was a lake to the south, or down to the south, and to take the side of the town he was on at the time with the sheep; it was good water, he was sure it was, the stock had watered there all the time, and better feed, and a good chance to follow out, and strike the road again. That was about all that was said in regard to the road, that I remember. I think he and Acree then went and had a drink; I went in the store.

Q. At the time the conversation took place, had the band of sheep come into sight yet?

[175] A. No, they had not, not to my knowledge, anyway.

Mr. BROWN.—You may cross-examine.

Cross-examination.

Mr. SANDERS.—(Q.) How did you know there were sheep there available for mutton if you hadn't seen any of them, and didn't know there were any in existence there? A. Sir?

Q. How did the fact that you desired to buy a mutton, or get hold of a piece of mutton, come into your mind when there were no sheep in sight, just simply a wagon?

A. Why, we took it for granted it was a sheep wagon, see? In fact, after Acree had talked to the

(Testimony of Earl Bohannon.)

man, he told us he had sheep; Acree inquired and asked him if he had sheep, see? But I think there was nothing said about the sheep, only we thought it was a sheep wagon; I have seen several sheep wagons in my time.

Q. That talk was had subsequent to the first conversation that you and Acree had together,—the conversation with Mr. Garry was had subsequent to the conversation which you and Acree had, with reference to inquiring of this man about the sheep, thinking possibly you could get a mutton?

A. When we saw the wagon we took it for granted it was a sheep wagon, see? And he says, "Let's go in and see if we can get a mutton," Acree said, in the store; I don't think he had spoken to McGarry until they came out on the porch, and he asked McGarry if he had a sheep, and he said yes. Of course we took it for granted it was a sheep wagon, because we had both seen sheep wagons before—that is, I think Acree had, I know I had.

Q. Simply because it was a sheep wagon you thought it would be a chance to get mutton?

A. Yes, mutton were nice at that time of year.

Q. Pretty high priced?

A. Yes, I guess they are, not as high as beef, though, I don't think.

[176] Q. What?

A. Not as high as beef, though.

Q. Who was it discussed that the man was a mover?

A. Someone remarked to that effect, I think, that

(Testimony of Earl Bohannan.)

they thought they were movers.

Q. You and Acree thought that it was a sheep wagon? A. A sheep wagon, yes.

Q. Well, when he went into the store, do you know what he did after he got in there?

A. No, I could not say.

Q. Did you follow him in the store?

A. I think I did, Acree did, I know.

Q. You are not positive yourself about that?

A. No, I would not swear to that; I didn't take place much in the conversation, I thought Acree was telling him about all there was to tell.

Q. The first thing that you remember of Mr. McGarry saying after he came out of the store, was to make the inquiry as to the road to Mina?

A. Yes.

Q. And Mr. Acree directed him? A. Yes.

Q. And told him to take what road?

A. Down around by the pump-station; that is before he inquired whether he had sheep or not, see?

Q. Before any discussion of the sheep, Mr. McGarry discussed the outlet from Millers to Mina?

A. Yes; Acree then asked him if he had sheep, and advised him not to go there on account of the water; McGarry asked if that was rain-water or cyanide water—that is when the sheep came up, I believe.

Q. How many roads lead out of Millers to Mina?

A. Only the one to my knowledge.

Q. That is the road these sheep took out of Millers?

A. They didn't take the road exactly; they kept in

(Testimony of Earl Bohannon.)

on the flat, [177] that is, through the sagebrush,—kept off of the road.

Q. Down by the— A. Pump-station.

Q. Down by the pump-station they came up to the road from the east?

A. From the east; from the Tonopah side, across the Tonopah and Millers road, and kept on through the flat to the east of the road all the time.

Q. To the east of the road, and that is the main public travelled road north out of Millers?

A. Yes.

Q. The fact is, it is the only road to get out in that direction, isn't it? A. From Millers?

Q. Yes. A. The only one I know of.

Q. How long have you been familiar with Millers?

A. About a year—eight or ten months.

Q. That road has been that way all the time, has it not?

A. The road has been there ever since I knew it.

Q. Now, you spoke in this conversation between Mr. Acree and Mr. McGarry, that considerable water was around about this, what place do you mean?

A. Through the flat, all through the flat.

Q. All over the flat?

A. All over the flat, lots of water.

Q. Lots of water?

A. Yes, rain-water and freshet water from Peavine.

Q. Rain-water and freshet water from Peavine?

A. Yes.

Q. And that water was generally known to be rain-

(Testimony of Earl Bohannon.)

water and freshet water coming from Peavine, and in a northern direction? A. Yes.

Q. Was the water in such a position that it was pretty generally known to all people down there in Millers at the time?

A. The water generally known to the people?

Q. Yes.

A. Yes, I think so, it could be seen.

Q. It wasn't considered as being particularly dangerous or poisonous, or anything of that kind, was it, Mr. Bohannon?

[178] A. Well, I don't know; I would not have wanted to drink the water, or turn any of my stock in there.

Q. Well, why do you say that?

A. For the simple reason that there might be cyanide there, you know, in close to the mill; of course I don't think there was in Peavine, I would be absolutely sure, because there was stock watering on Peavine at the time; but in this rain-water pool, there was no chance for Peavine to get in at this place.

Q. And if there was danger of cyanide at a point along up and down the flat, which was the direction that these sheep came, there might have been cyanide at one point as well as another point, might there not?

A. No, not necessarily, because, as I said, there was no chance for Peavine to get in where this water was.

Q. The fact is the Peavine water was across the raise there?

(Testimony of Earl Bohannan.)

A. Yes, there was the sand bar in there.

Q. The Peavine water could not get over this track the sheep took?

A. That is the idea—couldn't get within a mile or half a mile.

Q. If this Peavine water was not impregnated at all, would you think all of the water that was standing in that flat, over the land or the premises that the sheep travelled over, was impregnated with cyanide?

A. Well, you know to my knowledge there was only just this little slough in there this side of Peavine, see?—just this little one pond.

Q. Nobody knew there was any cyanide around there at all,—the fact that the cyanide had been impounded up there by the company?

A. Just a short distance above.

Q. And that was supposed to prevent any cyanide solutions from escaping over this uninclosed ground, was it not?

A. I don't know what their object was; it may have been just to work the mill-pond, for all I know, for impounding it there, or it [179] may have been to hold it, I could not tell.

Q. But, as a matter of fact, you have been at Milers postoffice, and you knew where the pump-station was located, did you? A. Yes, sir.

Q. And it was generally thought around that neighborhood, that this was rain water that had come in there with the recent rains, and wasn't poisonous at all? A. I think that was the opinion.

Q. That was the general opinion?

(Testimony of Earl Bohannon.)

A. Yes, of course you could not take any chances, as I told McGarry.

Q. Well, of course it ain't a question of that kind, but it was the general belief of all the people around there that this was rain water, and it was all right?

A. No one wanted stock to go in there for those purposes.

Q. That was just simply a matter of opinion of yourself and Mr. Acree?

A. That people didn't want stock in there? It seemed to be the opinion of the ranchers; there was five or six of them running cattle in that country, and they cautioned their herders to work their cattle north.

Q. Well, now, where did you get that; did you ever see any cattle herded around there?

A. Yes, sir.

Q. How frequently? A. Sir?

Q. How frequently? A. All winter.

Q. Whose cattle were they?

A. Why, they belonged to ranchers in Smoky—Moore and Woods, and ranchers.

The COURT.—You mean around these works?

A. Stock was supposed to be kept within twelve miles of there, eleven or twelve miles—sixteen miles I guess it was, to Liberty; that is where the water was for the winter range of these stock, for these cattle.

Q. What I wanted to know was whether you had seen stock herded [180] around these cyanide works?

(Testimony of Earl Bohannan.)

A. I seen them forced back from them.

Mr. SANDERS.—(Q.) By whom?

A. By the herders.

Q. When was that?

A. Oh, during the winter months, I could not tell you at what time.

Q. Isn't it a fact that the cattle range does not extend down to Millers at all, and, as you say, the cattle are kept about twelve miles north of Millers, in the neighborhood or vicinity of a place called Liberty?

A. Yes.

Q. And if any cattle come down in that direction they are strays usually, are they not?

A. Not necessarily; there is good feed in there, mind you, and the water being so high last year, stock will follow water if there is any feed at all, and they naturally crowd down that way as long as they can get water, looking for an open range, good range, and they would crowd and get just as far as they could down; that is what the herder was kept there for, to look after the water.

Q. Some did get into this cyanide at one time, did they?

A. I could not swear to that, I don't know.

Q. Did anyone ever discuss the fact of stray cattle getting over into that cyanide tailings pond?

A. Why, I believe I did hear something too, about some dairy stock, come to think about it, straying down that way; whether they got in there or not, I don't know.

Q. Do you know about when that was?

(Testimony of Earl Bohannon.)

A. No, I don't.

Mr. BROWN.—I object to hearsay.

Mr. SUMMERFIELD.—The last question was if he knew the time.

Mr. BROWN.—It is purely hearsay.

Mr. SANDERS.—(Q.) Now all this talk, Mr. Bohannon, about the feed, and the water in this lake, was that a general conversation [181] as to the range conditions about that particular place, or was it brought out by discussion of the questions of distance and direction as to the way he wanted to travel—Mr. McGarry?

A. Well, the reason we brought up that lake was for the simple reason we knew Peavine fed the lake, and didn't think there was danger of cyanide there, as Peavine didn't connect with these small sloughs, see? Also that the feed was good, because we had been there.

Q. Isn't it a fact that Acree and McGarry engaged in a discussion at that time as to the desirability of this particular point, as being about the range for sheep?

A. Why, Acree told him it was a good range.

Q. And didn't Acree also suggest, and didn't you state it, that McGarry said that he was driving his sheep into a range further north?

A. Yes, that was my impression of it, that they were going to a winter range some place.

Q. Now, when that winter range was discussed, didn't the discussion lead on the part of Acree to the advisability or to the desirability of this lake and its

(Testimony of Earl Bohannon.)

vicinity, being a suitable range for sheep?

A. No, only just the way I understood it was that Acree informed him it would be a good place for him to camp on his way through to his range; we didn't suppose he was looking for a range, we supposed that he had one located,—knew where he was going.

Q. And that he was driving these sheep through the country?

A. Yes, ranging them along slowly as he went.

Q. Driving along the public road?

A. I didn't know where he was driving them.

Q. And the sheep came in on the public road down below on the east side of Tonopah?

A. I don't know whether they got onto the road or not; I know they were drove through the flat, through the brush.

[182] Q. Did you go out there when these sheep got into the water?

A. After they got in that evening, I believe; we were in Tonopah that day.

Q. Now, were you familiar with the range around Millers at all, other than you have stated?

A. No, I think not, never run any stock in there.

Q. Never have?

A. I have driven through the country some.

Q. Had you ever been over this range, about this lake? A. Had I ever been over it?

Q. Yes. A. Yes.

Q. With reference to feed, had you ever ridden cattle in there? A. No, I have not.

Q. Have you ever considered that as being suitable

(Testimony of Earl Bohannon.)

or unsuitable for range purposes?

A. I thought it was a good range, while I was there there was plenty of water, and lots of feed, more feed than I had seen any place in the country.

Q. Now, how far would you say that that place is from Millers? A. Which, the lake?

Q. Yes. A. Oh, two to three miles.

Q. How far from this road that Mr. Acree directed Mr. McGarry to take?

A. How far from the road?

Q. Yes.

A. Well, the road was north of Millers, and the lake is two or three miles south of Millers, but the road would swing off, and bear off more to the south, more to the south as across the flat from where the sheep were.

Q. About what was the distance?

A. Oh, the lake from the road would be at least three or four miles.

Q. You would have to approach it on the south side of the railroad?

A. Yes, right up Peavine Creek.

Q. That would lead you up how far from McClain's Station?

[183] A. Oh, I could not tell you, I am sure; I have never been in McClain's only through on the railroad.

Q. Have you ever gotten across from the south side of this road that Acree directed McGarry to take?

A. No, I never had occasion to go through there.

(Testimony of Earl Bohannan.)

Q. As a matter of fact, you are not familiar with the situation? A. Not through there.

Q. Your business kept you down around in town?

A. In town, yes.

Q. Were you working for the Mill Company?

A. Part of the time, and part of the time for the Nevada-California Power Company—most of the time for them.

Q. And your attention in a business way has never been called to any of the conditions you have described?

A. Only in regard to the range around the lake, that is all; I know cattle pretty well, and I thought it would be a good range for them.

Q. Now, knowing it so well, and taking such an interest in the conversation that was had there, I will ask you again, wasn't it a question of the discussion of range and feed for this stock, between McGarry and Acree, when the lake was mentioned?

A. Well, the reason Acree advised him to go there was—

Q. (Intg.) I didn't ask you that, I didn't ask you what was the purpose of his going; I asked the condition brought about by reason of the character of the range, which you so well knew.

A. He told him there was good feed and lots of water there at the lake.

Q. And that it would be a pretty good place for sheep and cattle to go? A. Yes, sir.

[184] Mr. SUMMERFIELD.—Might I ask a question?

(Testimony of Earl Bohannan.)

Q. Mr. Bohannan, were you present at all the conversation between Mr. Acree and Mr. McGarry when Mr. McGarry first got there?

A. Yes, up until they went to the saloon, as I said, and I left them there; but everything I have stated, I was there at all that conversation.

Q. Did you hear any conversation between them about the water standing on the flat and on this road below the pump-house? A. I did.

Q. Did you hear all of that conversation?

A. I think so.

Q. Did you at that time hear Mr. Acree tell Mr. McGarry that he thought it was rain-water?

A. Yes. I think he said he thought it was rain-water, but there might be cyanide in the water.

Q. Might be?

A. Yes; in fact, I think Mr. McGarry asked if there was cyanide in the water, if there was any chance of it, and Mr. Acree said he thought it was rain-water, but he would not advise him to go through there, that it might be cyanide; then he asked him if he had sheep.

Mr. SUMMERFIELD.—That is all.

Redirect Examination.

Mr. BROWN.—(Q.) Going from the pump-station north to Peavine, how far is it from the pump-station over to Peavine Creek?

A. Well, you know Peavine spreads out there so much, has so many different channels, it is really hard to tell where the main channel is there during the freshet; it looked to me like it could be a half a

(Testimony of Earl Bohannon.)

mile or a mile, or perhaps more even.

Q. Now, the Smoky Valley ranchers whose cattle you have seen in the valley there, have they come in there in considerable herds, or just a few cattle?

[185] A. Well, in the valley they run their stock there, up at Liberty it is a good range and plenty of water.

Q. Liberty is how far away?

A. About seventeen miles fom Millers, I think, according to the pole line of the Nevada-California.

Q. And running from Liberty how close do they allow the cattle to come down to Millers?

A. Not within five or six miles.

Q. So when you speak of seeing cattle in that country, you refer to cattle that are off five or six miles? A. I do, or ten miles.

Mr. BROWN.—That is all.

[Testimony of S. Floathe, for Defendant.]

[186] Mr. S. FLOATHE, called as a witness on behalf of defendant, having been sworn, testified as follows:

Direct Examination by Mr. BROWN.

Q. Will you state your name? A. S. Floathe.

Q. Where do you reside at the present time?

A. Millers, Nevada.

Q. How long have you lived there?

A. Two years and one month, about.

Q. What business are you engaged in there, Mr. Floathe?

A. I am leasing from the Belmont, leasing a slime-pond from the Belmont Milling Company.

(Testimony of S. Floathe.)

Q. What is the nature of the operation that you are carrying on there?

A. Well, after the slime runs out from the mill, we let it settle in dams, and after it dries we sweep it, the precipitation comes up on top of it, and lays there in the form of crust, a loose fluffy crust, and we sweep that and sack it.

Q. And you are working on the Belmont dam?

A. On the Belmont slime-pond, yes, sir.

Q. How far is the Belmont mill from the Desert mill?

A. Oh, I should say three-quarters of a mile, or half a mile, something like that, maybe less.

Q. Who constructed the dams at the Belmont mill?

A. We did, sir, my partner and myself.

Q. Were there any there before you started them?

A. No, sir.

Q. Were you at Millers on February 14, 1914?

A. Yes, sir.

Q. Did you meet William McGarry, the man who had charge of a band of sheep that came into Millers on that day? A. Yes, sir.

Q. Where did you meet him?

A. I first met him in the saloon, had a drink with him in the saloon. [187] And after that I met him in front of Dale Brothers store at Millers.

The COURT.—(Q.) What store was that?

A. Dale Brothers.

Mr. BROWN.—(Q.) Where did you learn that he had sheep?

(Testimony of S. Floathe.)

A. I asked him in front of Dale Brothers store; I could see the sheep across the track.

Q. What conversation did you have with him in front of Dale Brothers?

A. I asked him if that was his sheep, and he said yes; then I told him that to be sure and keep them on that side of the track, on the south side of the track, and not to get them on the north side, because if he did they would be liable to get into cyanide,—get into water there, and I told him if they do, you are liable to lose them all.

Q. What response did he make to that?

A. I don't exactly remember what he said, but he let me understand that he knew that it was dangerous to bring them over there.

The COURT.—(Q.) Do you remember just what he said?

A. No, I don't exactly remember his words, but something to the effect that I understand it is pretty bad over there, something to that effect.

Mr. BROWN.—You may cross-examine.

Cross-examination.

Mr. SANDERS.—(Q.) You have been at Millers, you say, for how long?

A. A little over two years.

Q. What has been your business or occupation?

A. Leasing.

Q. All of this time?

A. All of this time, yes, sir.

Q. Before that time had you ever had any business dealings in or around Millers? A. No, sir.

(Testimony of S. Floathe.)

Q. You did run a Ford car down there for a while, didn't you?

[188] A. No, sir—just since that time; but I have been out of Millers lots of times since then.

Q. How did you get out mostly?

A. From Millers?

Q. Yes, going north? A. Going where?

Q. Anywhere in that northern country.

A. I go down by the slime-pond by the Desert pump-house at Millers.

Q. That is the only way to get out, isn't it?

A. Out of Millers, yes, sir—oh, no, you can go on the south side of the track, and by Lone Mountain, and that way, of course, to make a big circle round.

Q. But the usual custom, and only way of getting north from Millers is over that road?

A. Yes, sir.

Q. And you have known it for over two years, and travelled it for that length of time? A. Sir?

Q. And travelled it for that length of time?

A. Yes, sir.

Q. And that is the road where these sheep got the cyanide, is it?

A. On that road, yes, or near that road; I don't know if it was on the road exactly; I know it was close to the pump-station there.

Q. You met Mr. McGarry in the saloon about what time of day?

A. Oh, I should say it was maybe half past two or three o'clock in the afternoon.

Q. Was there any discussion had about water, or

(Testimony of S. Floathe.)

the condition of the north side of the road or railroad at that time?

A. No, sir, we didn't speak at all about that, I just met him in there.

Q. Did you come out of the saloon with him at that time?

A. No, sir, I went over to Dale Brothers store to look for the mail, and I stopped on the platform there, and I happened to see the sheep over there across the track.

Q. About what time of day was that?

[189] A. Oh, shortly afterwards, maybe three o'clock, just a few minutes afterwards; he came out a few minutes afterwards, and stood there; he was standing down on the ground while I was up on the platform, and I went down and spoke to him; I was afraid the sheep would get in my slime-pond, that was my reason for talking to him.

Q. And he said he had been advised, and knew the condition?

A. He says, "I understand it is pretty bad," or some words to that effect; I don't exactly remember what he said.

Q. Now, how far is your slime-pond from this point where the sheep got the cyanide?

A. Well, I guess, oh, maybe three or four hundred yards.

Q. Do your slimes extend down to the point where the sheep were killed?

A. No, sir, ours runs further west than that.

Q. Further west in a different direction?

(Testimony of S. Floathe.)

A. Well, they both run down, the ground slopes down, you know, and they keep kind of parallel running down.

Q. But yours takes more of a northeasterly direction, does it not, from your plant, than that which the Desert Power and Mill Company's takes?

A. More northwesterly.

Q. More northwesterly, yes, I believe you are right; and before you got into this business they were not confined at all?

A. No, not confined at all; they were running loose.

Q. How is it with the Desert Power and Mill Company?

A. They have always dammed their slime-pond.

Q. Now, do you know whether they permitted them to escape in any way or manner?

A. The which?

Q. Do you know whether or not they ever permitted them to escape?

A. Oh, I guess they broke through occasionally; I have never been over to their pond; I tried to get a lease on it one time, and I could not get it, and naturally I didn't go near it no more, but I [190] could see men working on the dam all the time; they had two men there working on the dam all the time.

Q. Why would you say, then, that it was dangerous for sheep to go along the public road?

A. I didn't speak of the public road; I told him if he got them across the track; we had ducks and coyotes, we picked them out almost every day, out

(Testimony of S. Floathe.)

of our slime-pond—ducks and coyotes—and I knew if sheep or cows, or anything else, comes there, and gets into the cyanide water—

Q. (Intg.) It would be all off with them?

A. All off.

Q. Now, isn't it a fact, Mr. Floathe, assuming this circle here (indicating on map, exhibit "A") to represent the tailings pond of the Desert Power and Mill Company—you are pretty familiar with the surface on the outside of that pond? A. Yes.

Q. And know it is vacant, unoccupied, desert land, don't you, this land in here? A. Yes, sir.

Q. Now, isn't it a fact that down there at Millers everybody knew or believed that the water that had accumulated at the point on the road, as well as at different points in the country surrounding, was caused by the excessive rains at that time?

A. Well, the Peavine comes in there, you know; I don't exactly know where all that water comes from; I know that Peavine comes running down further out in the lake, I hardly think it will break through there; I think the water down there close by the pump-station I presume is mostly rain-water.

Q. Mostly rain-water? A. Yes.

Q. And everybody in the community considered it as rain-water, as far as you know?

Mr. BROWN.—I object; that is calling for the conclusion of the witness.

Mr. SANDERS.—I withdraw it, then.

(Testimony of S. Floathe.)

[191] Q. There had been considerable rain down there up to and previous to February 4th or 5th?

A. Yes, quite a rain.

Q. Now, it wasn't generally known, or was it generally known, that any slimes escaped from the Desert Power and Mill Company's pond?

A. I don't know.

Q. It was considered secure, and put there for the purpose of not allowing the solutions to get out on the desert? A. I presume so.

Q. And the community thought that was a sufficient barrier to prevent its escape?

Mr. BROWN.—I object to what the community thought.

Mr. SANDERS.—(Q.) Didn't you feel it was a sufficient barrier to prevent its escape?

A. I never gave it a thought.

Q. You never gave it a thought?

A. Never gave it a thought; I know below our slime-pond there is water coming in there, you know, quite a ways below our slime-pond; and I know whenever I see cattle or anything else coming there, I drive them away if I can, if I am there.

Q. You say there is water standing below your slime-pond?

A. Occasionally, whenever Peavine runs over, the water stands in big pools there.

Q. Now, is this water you speak of in the vicinity of your slime-ponds,—you say that is Peavine Creek water?

A. When the Peavine overflows, it leaves it there.

(Testimony of S. Floathe.)

Q. Do any of the slimes get into what is called a lake up there?

A. Which—the lake what we call a lake, no, no slimes can get in there.

Q. No slimes can get in there at all? A. No.

Q. You say that you presume this was rain-water at the point where the sheep got into it?

[192] A. Well, I would not say, because I have never paid enough attention to it; in the fall when the Peavine comes down she floods that whole country, you know; it forms an enormous big lake out on the flat, and that water naturally goes all over, you might say; I have never traced it to see whether there was an inlet to this lake where the pump-station is or not; but I know after a rain there is always generally water there by the pump-station.

Q. And your judgment is that was rain-water, and it was permitted to stand in the public road?

A. I would not say it was rain-water; I could not say that, because I am not sure.

Q. And the only danger of that water was the possibility of the escape of solutions from the Desert Power Company's pond?

A. Well, I suppose that is what killed them, cyanide; I don't know.

Q. It is the first time you ever had any direct knowledge of any poisonous water standing on the desert in or around this particular point?

A. Well, I knew that the water around them slime-ponds, around them tailing-ponds, anywhere near around them, is dangerous, either our slime-pond or

(Testimony of S. Floathe.)

theirs, any water close to them slime-ponds I know it is dangerous to drink, because I have seen animals die there.

Q. The only question is, how far the slimes would extend, the solutions would extend over the surface?

A. I don't know how far; I would not drink water anywhere on that flat, excepting that might come down from Peavine when I seen it coming.

Q. This pump-station is right along the public road, isn't it? A. Right along that road, yes, sir.

Q. Did Mr. McGarry tell you how he knew it would be dangerous to bring them over on this side of the track? A. No, sir.

Q. Did he enter into any discussion with you as to a suitable or [193] proper place to water?

A. No, sir.

Q. Did he make any inquiry as to where he could find clear unimpregnated water?

A. Not from me, no, sir.

Q. And did he say that there was a point further below that he could find to be free from any danger?

A. No, sir; it wasn't mentioned between us.

Q. It wasn't mentioned between you?

A. No, I went right on after telling him.

Q. Did you see him after that?

A. Didn't see him after that; in fact, never saw him until after the sheep were dead, and then I didn't speak to him, just saw him there.

Q. And the sheep had gotten up, you say, on the south side of the town at the time you had the talk with him at Dale's store?

(Testimony of S. Floathe.)

A. Yes, they were right on the south side of the track at that time.

Q. Did he say why he had brought them up on that side instead of on the north side?

A. No, sir; he didn't say, but he came from that direction, so I assumed that was his reason.

Mr. SANDERS.—I think that is all.

Mr. BROWN.—That is all.

[Testimony of Samuel Fickes, for Defendant.]

[194] Mr. SAMUEL FICKES, called as a witness on behalf of defendant, having been sworn, testified as follows:

Direct Examination by Mr. BROWN.

Q. State your name, please.

A. Samuel Fickes.

Q. Where do you reside, Mr. Fickes?

A. At Millers, Nevada.

Q. Where is your place of residence there?

A. It is about a half a mile northeast of Millers townsite.

Q. And where is it with reference to Los Kamp's house?

A. It is between a quarter and a half east of Los Kamp's, I should judge.

Q. And you reside there, do you?

A. Yes, sir; we are living there; that is, we live there.

Q. You and who else? A. My wife.

Q. How long has that been your home?

A. Since 1908.

(Testimony of Samuel Fickes.)

Q. Is there any residence or other building closer to your place than Los Kamp's?

A. I don't think there is; well, no, there ain't any now.

Q. So that you are off there by yourself, in a sense? A. Yes, sir.

Q. How much acreage have you there in your place?

A. Well, I claim three hundred and twenty.

Q. Acres? A. Yes.

Q. Were you in Millers on February 4, 1914, when a band of sheep came to town? A. Yes, sir.

Q. On that day, did you see William McGarry, the man in charge of the sheep?

A. Well, now, I don't know his name,—I didn't know his name, but there was a man in charge of the sheep there.

Q. Was he an American or foreigner?

A. I think he was an American; I would take him to be.

[195] Q. Where did you meet him?

A. Well, I went up from my place there,—my wife says, "There will be a chance to get a lamb or a sheep, and you had better go up and see if you can't get one," so I went up there and I asked him if he would let us have a lamb, and he said yes, he would.

Q. Did he sell one to you?

A. Well, you might say he did, and he didn't; he told me I could get it the next day; I asked him if he would kill it, and he said he would.

(Testimony of Samuel Fickes.)

Q. What conversation did you have with him there at that time?

A. Well, he asked me something about the water; we could see some little puddles down on the dry lake; this was up above the railroad track, south of,—a little southeast, I might say, of Millers, and we could see some puddles down on the dry lakes.

Q. Where were those puddles with reference to the pump-station?

A. Well, they was beyond the pump-station quite a little piece.

Q. How far?

A. Well, now, I don't know exactly about the distance.

Q. Are these the puddles that the sheep got into the next day? A. I don't think so.

Q. Well, go ahead and state the conversation.

A. Well, he asked me about the water, and also he asked me about cyanide; well, now, the water we saw, I told him I didn't think there was, but I wasn't positive whether there was cyanide in it or not; I says, "There might be."

Q. On the next day, February 5th, did you see the sheep again on that day? A. Yes.

Q. Where did you see them, and under what circumstances, state it in your own way?

A. Well, the herder had drove them around, and was driving down I guess, to water, and they came on along close to our place, and I was afraid they might get into the yard, and I [196] told my wife that I

(Testimony of Samuel Fickes.)

was going out to kind of head them off a little bit, keep them out, they was coming in—looked like they was coming in between the stable and the house, and chicken-houses. “Well,” she says, “I will have to go out and keep the dogs off, too”; I have got four dogs,—lots of coyotes around there, and we had some trouble with one of our dogs coming from Oregon to Tonopah, we was crossing the divide between—

Q. (Intg.) Just leave that out.

A. Leave it out, well, all right, I just wanted to show you. Well, I went out there, and the sheep went right along back of the stable, some of them went over the manure pile, you might say, came up pretty close of the house; of course, it was none of my business particularly; and they scattered,—after they got by the stable, scattered around a little bit to the south; it was none of my business particularly, but I told the herder, I says, “I would not let them scatter too much, there might be some cyanide down there, but he didn’t—

Q. (Intg.) How close to the herder were you when you said that to him?

A. Oh, fifty feet, I should judge.

Q. Was Mrs. Fickes out there at the same time?

A. She was out there scolding the dogs.

Q. And they were scattering in what direction at that time?

A. Yes; they was scattering both ways.

Mr. BROWN.—You may cross-examine.

Cross-examination.

Mr. SANDERS.—(Q.) How long have you lived

(Testimony of Samuel Fickes.)

at Millers? A. Well, since 1908.

Q. What time of year did you first get in there?

A. I think along about the first,—before the 4th of July; in June, [197] I think along in June.

Q. June or July, 1908. How did you approach the town; were you on the cars or were you in a private conveyance?

A. I was living at Montezuma Wells at that time, and I came over to Millers from Montezuma Wells.

Q. How long had you lived at Montezuma Wells?

A. About two years—well, might have lived there,—let me see, I went in there at the time of the Manhattan excitement.

Q. That was in 1904? A. No, in 1905.

Q. Discovered in 1904, and the excitement began in the latter part of 1904 and the first part of 1905.

A. We went in there in January, 1905.

Q. You got there about the same time that I did, didn't you, do you remember, along in that neighborhood?

A. Let's see, it must have been very near three years I was at Montezuma Wells, not quite.

Q. You went to Millers in June or July, 1908, and, according to your best judgment, you got to Montezuma Wells in 1905?

A. In 1905, in January, 1905.

Q. What road did you take to get to Millers in 1905, from Montezuma Wells?

Mr. BROWN.—Objected to as not cross-examination.

The COURT.—He can go into the question of that

(Testimony of Samuel Fickes.)

being a public road.

Mr. SANDERS.—I have not asked him anything about a public road.

The COURT.—If it has any bearing on that, I suppose Mr. Brown has no objection to it?

Mr. BROWN.—No objection.

The COURT.—Of course, if you want to examine him on that matter, and examine him in chief—

[198] Mr. SANDERS.—Yes, sir; this is preliminary, so I can get the knowledge of the witness, and make him my own witness on that point; I have never had any talk with him, I don't know anything about it.

The COURT.—Of course, you have already put in your case in chief, but we are informal, and there is no jury here.

Mr. SANDERS.—(Q.) Now, you came from Montezuma Wells to Millers? A. Yes.

Q. In a private conveyance?

A. In my own conveyance, yes.

Q. What route did you take?

A. I came across—they had been hauling some machinery from Millers, the Liberty Company, mining company; and they made a road around to haul that machinery; they made a road around to what was called the Tonopah and Sodaville, and then they came down that road, that went—let's see, west about a half a mile from where they struck the Sodaville road, and then they went west about a half a mile, and then they turned up the old lakes, the dry lakes, to Millers.

(Testimony of Samuel Fickes.)

Q. And struck right down to Millers?

A. Yes, because it was a better grade, and wasn't so much sand. But the way I came, I made a road of my own from the Sodaville road over to this place where I am speaking, I cut a road right through there; that would be about, I should judge from my place, it would be a good half a mile from the Sodaville road.

The COURT.—(Q.) That was how many years ago? A. That was in 1908.

The COURT.—That has reference to this road, then?

Mr. SANDERS.—That has reference directly.

The COURT.—That would be your testimony in chief.

Mr. SANDERS.—Well, let it be considered up to this point as our testimony, and later, after consultation, I will decide whether to make him my witness on this matter of roads.

[199] The COURT.—There was nothing, it seems to me, in the direct examination which would permit you to go into the matter of that being a public road.

Mr. BROWN.—We stand on the objection on that point; if they want to press that point we stand on the objection. I think he has sufficiently tested his recollection and the accuracy of his memory.

The COURT.—I will allow you to put in the testimony, but it will be your testimony.

Mr. SANDERS.—I will not ask any further questions on that point.

(Testimony of Samuel Fickes.)

Q. Now, you say that your house is located within one-quarter or one-half a mile east of Los Kamp's place? A. Between a half and a quarter.

Q. What is the character of the country between your place and Los Kamp's place?

A. Well, it is mostly sand and sagebrush.

Q. Is there any running water of any kind, character or description between your place and Los Kamp's place? A. No, sir.

Q. Who is Los Kamp?

A. He is the gentleman that is running the pump-station for the Tonopah Mining Company.

Q. Where is that pump-station located with reference to your place?

A. It is located, as I told you, between a half and a quarter of a mile west of me.

Q. And that is right at Los Kamp's home, practically?

A. Yes, sir; he lives there, I guess; I don't know.

Q. What divides or separates Los Kamp's residence from the pump-station?

A. Just a road, I should judge, from where he lives; it can't be more than between twenty-five and fifty feet.

Q. Was it a rainy season previous to February 4th or 5th, in that neighborhood?

A. Well, stormy, it might be rain and it might be snow.

[200] Q. It was stormy weather?

A. Yes, off and on.

(Testimony of Samuel Fickes.)

Q. As a result of those storms and snows, was water standing on your premises, as well as between your place and Los Kamp's place?

A. There wasn't anything standing on my place, because there was too much sand, it would naturally soak it up.

Q. How was it between your place and Los Kamp's?

A. Well, the same way, until you get over to Los Kamp's.

Q. Till you get over to Los Kamp's.

A. Over to the lakes; Los Kamp is located right close to a dry lake; there is a little sand down there, you might call it—I would not know hardly what to call it; you might say it was a high place between the main lakes and Los Kamp's.

Q. Now, Mr. Fickes, can you tell the judge about where those lakes are located with reference to this road passing between Los Kamp's house and the pump-station; I don't know where those lakes are that you are talking about.

A. You can see them from Millers; you can see the dry lakes there for a long ways.

Q. You are speaking of dry lakes?

A. Dry lakes, but there is water in them in wet weather; that is, a little of it runs down there from Peavine; it runs down there, and there is quite considerable water through there during wet weather when the snows are melting, it runs down from the Peavine Mountains.

Q. I understand. What I am getting at is was

(Testimony of Samuel Fickes.)

there any water in any dry lakes west of Los Kamp's place?

A. Well, now, I didn't go down there, but there might have been some there.

Q. You don't know whether there was or not?

A. I didn't go down there until after the sheep had got in there, because I wasn't interested; there was some water in there when I [201] went down, and it appears that it was cyanide water.

Q. Well, now, we will come to that question of cyanide water; there was no cyanide water at all below that point, on the east side of the road?

A. Below Los Kamp's?

Q. Yes, on the east side of the road, in the direction of your house? A. No.

Q. None at all? A. No.

Q. The fact is, you of your own knowledge as an old timer in the community, were conscious of the fact, as far as it was possible, that the cyanide water did not extend down to the public road?

Mr. BROWN.—What road?

Mr. SANDERS.—And the water at that time was rain-water—I will add that to the question. Now, is not that the situation?

WITNESS.—Do I have to answer that question?

Mr. BROWN.—Yes, go ahead and answer it the best you can.

A. Well, as far as that part is concerned, I didn't bother myself enough to know whether it was cyanide or whether it was rain-water.

Mr. SANDERS.—Yes.

(Testimony of Samuel Fickes.)

WITNESS.—Did you understand?

Mr. SANDERS.—Yes.

WITNESS.—So I could not say.

Q. The only way then that you knew that it was cyanide water at all was that these sheep drank it, and died from the effects of it?

A. Well, you might say so, yes.

Q. The sheep had come into your place east of the house, had they not?

A. Yes, they came in from the east to my place.

Q. They scattered at your place?

A. They scattered some at my place.

Q. And came on up to the water, did they not?

A. Yes, I guess they went to the water.

[202] Q. That was the only water that was known, as far as you could see, to exist there in that immediate vicinity?

A. That was the only what, you say?

Q. Water.

A. No, there was little puddles out in those lakes beyond there.

Q. Way beyond?

A. Not so way far, no—no, sir; they wasn't so very far; I told you there was a little sand between the lake where the sump-station is located and the big lakes, and this little lake is where the sheep got into the cyanide.

Q. Those lakes were on the public road, were they not, where the road passes over?

A. They was on the road there that the Tonopah Mining Company made down to the pump.

(Testimony of Samuel Fickes.)

Q. Down to the pump; and that road extended on over to where these dry lakes are that you speak of?

A. Yes.

Q. So these sheep when they passed your place were going in the direction of this water?

A. They was going in the direction of the water; I guess they was after looking for water.

Q. About what time of day was it?

A. Now, I don't know; I don't think that I—it was in the forenoon, I don't know, I could not say positively what time of day it was, but I should judge it was along about close to being noon.

Q. Close to noon? A. I should judge so.

Q. Well, now, coming back to the next day, you say that you had a talk with McGarry, where was it that you had that talk?

A. The next day did you say?

Q. The day that he came in.

A. What talk did I have with him?

Q. Yes.

A. Well, I went up there to get a sheep or a lamb.

Q. Who was present?

A. Mr. McGarry, I think that was the gentleman.

[203] Q. What time of day was that?

A. Well, I think that was along about noon, somewhere close to it, or a little after, I would not say positively.

Q. Now, tell us again what was said in that conversation?

A. Well, I asked him for a sheep, and he told me I could get one, and I furthermore asked him if he

(Testimony of Samuel Fickes.)

would kill it, and he said he would, and I told him I would take one.

Q. Was there anything said about the price?

A. Now, I forget about that, I think there was, though, but I forget about that, what he said he would let me have it for, or anything of the kind, I disremember.

Q. Did you come back to him that evening or afternoon, at any time?

A. No, I don't think I did, if I did I don't remember of it.

Q. You would not say that you didn't, would you?

A. I am just trying to think whether I went back there that day or not.

Q. Didn't you come back about five o'clock, and he didn't have the sheep, the herder hadn't gotten any, there wasn't any killed, or something of that kind?

A. I think maybe I might have done that, I would not say positively, but I think maybe I did.

Q. But you are sure if you had any discussion with him about water, that it was at the first time you met him, and not the second time that day?

A. I could not say which it was; it was one of the times.

Q. And you would not say in which conversation you had the discussion about the water and the cyanide?

A. I think it was the first, if I ain't mistaken now; of course, I am not going to be positive.

(Testimony of Samuel Fickes.)

Q. But it was certainly one of the two?

A. Sure.

Q. And did you bring up the talk about the water, or did he bring it up?

[204] A. No, he brought up that, as far as that is concerned; he asked me how that water was down there; we could see some puddles down there in the dry lakes, you might call them puddles; I don't know positively what they was; I wasn't down there, I hadn't been down there for quite a while, for three or four weeks.

Q. He made the inquiry himself?

A. I believe he did.

Q. And what did you say?

A. I told him that there was water down there, and he asked me about the cyanide, and I says, "I don't know about that," I says, "I am not positive about the cyanide, it might be."

Q. Might be; and then what did he say to that?

A. Well, I don't remember what he did say.

Q. Now, when the sheep the next day passed your place, were they looking for water, or were they on their way?

A. I don't know what they was looking for, only I told the herder there might be cyanide down there, and not to let them scatter too much.

Q. Did the herder ask you anything about that?

A. He appeared like—just got a grunt out of him, and it appeared like he was ignoring me; my impression was that he didn't understand English.

Q. Well, when you left McGarry's place that

(Testimony of Samuel Fickes.)

afternoon, or whenever it was, did he tell you that he was going to water across there the next day?

A. I think he said he was going to water his sheep, I think he did.

Q. Well, didn't he tell you that he was going to water the sheep the next day, and take them on to Rawhide?

A. Now, I don't know about that question, whether he did or not; he might have.

Q. You don't mean to say all of the conversation you had with McGarry [205] is, I want a sheep, and that he would give it to you the next day, and the water might be bad, or something to that effect, and you went on home; you don't mean to say that was all the conversation?

A. Now, it might have been; I wasn't interested in Mr. McGarry, or Mr. McGarry wasn't interested in me.

Q. Did he ask you anything about the direction to take to get out of there?

A. I believe he did now, when you come to speak about it.

Q. And you gave him the directions how to go?

A. I think I did, yes, sir.

Q. And he told you he would water the next day across over there where these puddles were, or in that vicinity, didn't he?

A. Now, I don't know about that part of it; he might have asked me all that, but it has been quite a while, and a man not being interested, why—

Q. (Intg.) That is the reason I am asking you

(Testimony of Samuel Fickes.)

so many questions; I don't want to worry you with them.

A. No, just ask me anything you want to, Judge.

Q. Didn't he say the next day he would go across by your house on to the road, and go out that way, and water the sheep?

A. Now, I don't know; I could not answer that positively; he might have.

Q. He might have told you, though, that he was going to take the sheep across and water them, and go on?

A. Yes; I guess he must have said something, I would not say positively.

Q. He said something like that anyway, didn't he?

A. Well, I don't know, I don't know whether he did or not.

Q. Just stop a minute and refresh your memory, and see if he didn't tell you that was what he was going to do; that he would let you [206] have a sheep, and that he was going to take them across that way to get out—was going to water them the next morning?

A. He might have, but I don't remember.

Q. You would not say that he did not? A. No.

Q. Now, coming back to the question I asked you a while ago, Mr. Fickes, what is your knowledge, if you have any, about how far the slimes extend down from the Desert Power and Mill Company's pond into the flat; have you any knowledge on that subject whatever?

A. Well, now, they extend down to the pump-

(Testimony of Samuel Fickes.)

station, and I don't know exactly.

Q. How long have they been extending down that far?

A. Well, as far as my knowledge goes in that respect, since the sheep was—might have been before; it was none of my affair, none of my business particularly, and I didn't pay no attention to it, and it is none of my business yet.

Q. I understand that.

A. Now, I don't know exactly the distance.

Q. I didn't ask you the distance. How long have you known of that condition there, that these slimes extended down to the pump-station?

Mr. BROWN.—He has already said that he knows nothing about it; we object to it.

Mr. SANDERS.—I think he does; how did he know that they extended there, if he didn't know something about it? He said positively that he knew that the slimes extended to the pump-station. Now, how long had you known that they did extend down that far, before the sheep were killed?

A. I didn't know they extended down that far; I didn't know where they extended, Judge; I didn't know because it didn't concern me.

Q. That is all I wanted to know, whether you did or not; that is [207] all I wanted to know.

A. I didn't know anything about where they extended, and didn't care where they extended, and if I had I would have answered the question in that respect, but I don't know; I didn't know how far they extended; I saw that there was cyanide down

(Testimony of Samuel Fickes.)

there.

Q. You never knew that there was any escape of cyanide from that settling pond, and that those solutions extended down to the pump-station, until these sheep were killed, did you?

A. I didn't know where they extended.

Q. Now, wasn't it the general reputation around in that community, as far as you knew, that the solutions of this cyanide didn't extend down to the public road before the sheep were killed?

Mr. BROWN.—It has not been shown that he is cognizant of the reputation in the community, and we object to it on the ground that it calls for his conclusion.

The COURT.—In your theory of the case, would that have any bearing unless it was shown that the general reputation had been communicated to your people?

Mr. SANDERS.—It is on this proposition: He says that he told McGarry that there might be cyanide in there; now I am asking how in the world he knew anything about it, and if he did know anything about it until these sheep fell dead in the road; that is the point I am asking. Now, I will repeat the question again, Mr. Fickes, so that you may understand it. (Q.) Did you or did you not know that any cyanide escaped from this pond, and extended down to the public road, before these sheep were killed?

A. Did I know or did I not know, was that the question?

(Testimony of Samuel Fickes.)

Q. Yes, sir. A. I did not know.

Q. You did not know.

A. There was a whole lot of slimes running down, that is the reason why I spoke to the herder, and also the [208] gentleman that was handling the sheep; there is a whole lot of slimes runs out there every day.

Q. How long had they been running out?

A. That is, they run into the slime-pond, understand; there was a chance for them to escape, of course; that is why I spoke to these gentlemen, and says, I am not positive, they might be.

Q. Had you ever seen them escaping?

A. Well, not particularly; I know that they break very frequently, break through the bottom; they break every place; they are a very hard stuff to hold, very hard to hold.

Q. And they run with such force out there that they break the channels or ditches?

A. They break anything, as far as that is concerned.

Q. And there are regular courses for these breakages to run through to get down into that flat?

A. No, there ain't regular courses, you might say; but they break every place; they make a course of themselves.

Q. And that has been done now for years, ever since you have been there?

A. Well, I don't know, I guess it has; I guess it happens in all slime-ponds, as far as that is concerned.

(Testimony of Samuel Fickes.)

Q. And this pump-station that you have spoken of is the place from which the domestic water of the town of Millers is supplied?

A. Well, it has been, I guess.

Q. It has been? A. Yes.

Q. Was it that way in February last? Was that the place where the people got their water?

Mr. BROWN.—I object to it on the ground it is not cross-examination, and not responsive to any of the issues in the case. I did not hear the previous question or I would have objected to that, and I move now to strike the answer and the former question also, [209] on that particular ground.

(By direction the reporter reads the last two questions and answers.)

Mr. BROWN.—I object to the two responses, and move to strike them out.

Mr. SUMMERFIELD.—I submit it is proper cross-examination; the witness was examined in chief about that pump-station, who lived there, where his house was, what his name was, and to operating or running the pump-station.

The COURT.—I do not think that is within the limits of proper cross-examination; that was simply locating the places. I do not think there was any intention to go into the character of the water with this witness, the character of the water as it existed down there on the flat; he was introduced to testify as to the conversation he had with Mr. McGarry and with the herder. I will sustain the objection,

(Testimony of Samuel Fickes.)

and the motion to strike will be allowed. You may have an exception.

Mr. SANDERS.—Now, if your Honor please, I am going to divert for a moment from the cross-examination, and ask this witness with regard to the means of outlet from Millers to the north, where this road goes.

Mr. BROWN.—Make him your own witness?

Mr. SANDERS.—Yes.

The COURT.—You can take it up now or take it up later.

Mr. SANDERS.—I prefer to take it up later; it may take us some time; we can take it up at another date.

Mr. BROWN.—It may speed the proceedings to go ahead now.

Mr. SANDERS.—(Q.) Mr. Fickes, on this question of roads leading out of Millers, do you know how long the road on which these sheep were killed has been travelled by the public there at that point, and [210] on out to the north?

A. You mean public road?

Q. Yes, sir, used by every one—the travelling public.

A. Now, Judge, the public road is the old Soda-ville road, that runs about between a mile and a half and a mile and a quarter north of Millers, I should judge; I am not positive about the distance—it is a mile anyway.

Q. Now, tell Judge Farrington what that Soda-ville road is, where it runs?

(Testimony of Samuel Fickes.)

A. It runs to Sodaville.

Q. From what point? A. From Tonopah.

Q. And that road has been there since the discovery of Tonopah and Millers?

A. Since the discovery of Tonopah, I guess; I don't know how long before it was there, because I wasn't in the country.

Q. Then how do you get from the Sodaville road, the old Sodaville road, as you say, down to Millers?

A. Well, there is a road made there—you see I was there, Judge, from the time they started to build the mills.

Q. That is the reason I am asking you about this road.

A. And as far as how long the Sodaville road was there, now I don't know; I know it was there from the time that Tonopah was discovered.

Q. Sure, we all know that.

A. And this road that runs up from the Sodaville road, you might say the main travelled road up to Millers, was made by the Tonopah Company.

Q. What time?

A. Oh, I should judge it was made in 1905 or 1906—from 1904, I don't know.

Mr. BROWN.—Are you testifying out of your actual knowledge, or hearsay? If it is hearsay, I move to strike. He says it is his judgment.

WITNESS.—Well, it might be; I don't know positively, no.

[211] Mr. BROWN.—I move to strike it out unless the witness testifies positively as to the date

(Testimony of Samuel Fickes.)

from his own knowledge, and not what might be.

Mr. SANDERS.—Well, I will withdraw it in this way—how long have you known that road—

The COURT.—Let me understand. This Sodaville road has nothing in particular to do with this case?

Mr. SANDERS.—That is the reason I want to bring this question out that I am asking now, from the point of the Sodaville road to the road going down to Millers.

The COURT.—I have not made any notations about this Sodaville road, because it didn't seem to me of any importance. The only question was as to the character of the road where the sheep were killed; this may have some bearing on that, but I have not discovered it yet.

Mr. SANDERS.—That is what I want to bring the witness to, is the road on which these sheep were killed.

The COURT.—He has testified that he knew that Sodaville road had been there since Tonopah was discovered, and whether it was there before or not, he don't know of his own knowledge; so that is the limit of his testimony on that point.

Mr. SANDERS.—Now I am going to ask this question: (Q.) How long then have you known of the road that leads out of Millers and connects with the Sodaville road to the north, of your own knowledge?

A. The Tonopah Mining Company made a road down to their pump-station.

(Testimony of Samuel Fickes.)

Q. That is not answering the question.

A. Well, it is answering the question, I beg your pardon. Then we came in from Montezuma Wells, and we would make for that pump-station, because the road was made from the pump-station up to Millers; it was made there, I guess, for their own benefit, not for [212] anybody else's, I guess; but we made that a point to come to that pump-station for to get a good road up to Millers.

Q. Now, when was that?

A. Oh, that was in, I think the first time I went over there, that is, to go there to trade, was along in 1906 or 1907, somewheres along there.

Q. 1906 or 1907. Now, isn't it a fact, Mr. Fickes, that at that time the people who lived north of Millers, and did their trading and got their mail at Millers, came in on that road?

A. Well, now, I guess they would come in that way?

Q. And that has been the main travelled public road since the time that Millers was discovered, has it not? A. It might have been.

Q. Well, don't you know it has been the main travelled public road out of Millers to the north since the discovery of Millers?

A. No, not of Millers.

Q. To the north?

A. You see the main road is the Sodaville road.

Q. I am not talking about the Sodaville road.

A. I am telling you the main travelled road is the Sodaville road.

(Testimony of Samuel Fickes.)

Q. The people of Millers don't jump over in flying machines to get to the Sodaville road, do they?

A. No, on this road you are speaking about they go that road to get to the Sodaville road.

Q. They are bound to travel this road, and that has been the main outlet?

A. Well, you might say, yes.

Mr. SANDERS.—That is all.

Mr. BROWN.—That is all.

By the COURT.—(Q.) Now, as I understand it, you have known that road since 1906 or 1907?

A. Yes.

Q. That is the road where the sheep were killed?

A. Yes, the road is close there where the sheep were killed.

[213] Q. And since that time it has been used as the main-traveled road by people going north from Millers to get to the old Sodaville road?

A. Yes, they go that way; there is another road that they could go, go out around the fence.

Q. Well, do they go that other road? A. Some.

Q. Which is traveled more?

A. Well, the road that goes by the pump-station is traveled the most, I should judge.

The COURT.—That is all.

Mr. BROWN.—(Q.) Which one was traveled the most, say two years ago? A. Two years ago?

Q. Yes.

A. Well, it was about a stand-off, I should judge, between the two.

Mr. BROWN.—That is all.

[Testimony of Dan McNaughten, for Defendant.]

[214] Mr. DAN McNAUGHTEN, called as a witness on behalf of defendant, having been sworn, testified as follows:

Direct Examination by Mr. BROWN.

Q. Will you state your name?

A. Dan McNaughten.

Q. Where do you reside? A. Millers, Nevada.

Q. How long have you resided there.

A. Almost two years.

Q. You are employed by the Desert Power and Mill Company? A. Yes, sir.

Q. In what capacity?

A. Well, I have been in several different capacities; I am now employed in the boiler-room, but I have worked in the mill on batteries and pipe fittings.

Q. Were you in Millers on February 4th, 1914?

A. Yes, sir.

Q. Did you see the man who had charge of the sheep at that time? A. I did.

Q. William McGarry was his name? A. Yes.

Q. Where did you see him on February 4th, 1914?

A. I seen him in the Turf Saloon.

Q. Did you hear him in conversation with any person there at that time? A. Yes, I did.

Q. Will you state what you heard of the conversation?

Mr. SUMMERFIELD.—I would like the witness to state first who he heard him in conversation with.

(Testimony of Dan McNaughten.)

Mr. BROWN.—(Q.) Do you know the names of any of the parties that he was talking with?

A. No, I do not; I was not acquainted with them; McGarry was pointed out to me as the man that was in charge of the sheep in there, and several fellows came in there that was acquainted with him, and were talking to him; I was sitting by a table reading, and the conversation came up.

[215] Q. And you don't know the names of the parties that he talked with?

A. No, I don't; I didn't pay no attention to them, to tell you the truth, and I overheard them talking.

Q. What did you hear of the conversation, Mr. McNaughten?

A. Well, I heard one party ask him how long he intended to stay around Millers; he stated that he would like to stay around for a week or so, but he was afraid of cyanide water.

Mr. BROWN.—You may cross-examine.

Cross-examination.

Mr. SANDERS.—(Q.) What time of day was this?

A. It was in the afternoon between two and four o'clock.

Q. Who was he talking with?

A. I don't know the gentleman's name that he was talking with.

Q. Was there more than one?

A. Yes, there was two or three; they were standing up to the bar having a drink at the time, and I

(Testimony of Dan McNaughten.)

was sitting back in a chair there by the table.

Q. Did he mean the whisky he was drinking, or did he mean the water out on the flats?

A. Well, he said "cyanide"; I don't know whether they were serving any of that in the saloon or not.

Q. It was just general barroom talk, loose braggadocio?

A. No, these men had come in and met him, and were old acquaintances, I guess, and just asked him how long he expected to be around there, and that was the statement; he said he would like to stay around a week or so, but he was a little bit afraid of cyanide.

Q. A little bit afraid of cyanide?

A. Yes, something to that effect; he was afraid of cyanide, anyway, he mentioned.

Q. How long did this conversation continue?

A. Well, I don't know, I wasn't in there very long; I was on the [216] night shift at the time, and just dropped in and stayed a little while, and went out.

Q. Can you tell us anything else that was said by him in that talk? A. No, I don't know as I could.

Q. What saloon was it, did you say the Turf?

A. The Turf, yes.

Q. And you don't remember anything else that was said?

A. No, I was not paying much attention to them, but I overheard that part; it struck me, his talk, you know; I was on that night shift, and my rooming-mate went uptown the next day, and he came back

(Testimony of Dan McNaughten.)

and told me about the sheep being poisoned with cyanide, and I remarked that man that was running them there remarked that he was afraid of cyanide, and it was funny that he would let his sheep go down there; it struck me as odd, the way it came up.

Q. A man afraid of cyanide and drove his sheep into it, it would strike anybody as funny?

A. Yes, it struck me that way.

Q. And you don't remember anything else that was said in the conversation?

A. That is all I remember.

Q. Do you remember whether the herder was in there with him or not?

A. I don't think he was; I would not say.

Q. Can you tell us who those fellows were that came in?

A. No, I can't; I didn't know them; I wasn't very well acquainted around there, anyway.

The COURT.—(Q.) Did you say the herder came in? A. No, I could not say that he did.

Mr. SANDERS.—(Q.) Have you seen any of those parties around there since they had this talk with Mr. McGarry?

A. No, I don't believe I have.

Q. When did you tell the superintendent, or anybody else, that you [217] heard this talk.

A. I told my partner the day that the sheep were poisoned; I told him and I believe he is the one that told Mr. Heydenfelt about it.

Q. Do you remember when that was—the next day, you say?

(Testimony of Dan McNaughten.)

A. Yes, the next day; I was on that night shift, and he came home from town just about the time I got up, and he told me about this, and that is the reason I told him.

Q. Mr. Heydenfelt came to you the next day and asked you about it?

A. No, I think it was the second day, I would not be certain; but I told my partner that same day the sheep were killed, and he happened to be out with Mr. Heyendfelt, I believe out to where the sheep were, and he told him about the conversation he had with me.

Q. And Mr. Heydenfelt then came to you about the next day?

A. It might have been the next day or the second day after that; shortly after that, I would not say for certain.

Q. You have been there ever since, have you?

A. Yes.

Q. Did you tell him about these other fellows that you heard the conversation with?

A. No, I never talked to any of them.

Q. Did he ask you to describe them to him to find out who they were? A. No.

Q. Did he request you to look them up?

A. No, sir, he did not.

Q. And you haven't seen them since?

A. Not to my knowledge, no.

Q. Have you ever seen any of them in Carson here? A. No, I haven't.

(Testimony of W. T. Holcomb.)

Mr. SANDERS.—That is all.

Mr. BROWN.—That is all.

(A recess is taken at this time until 1:30 P. M.)

[218] AFTER RECESS. 1:30 P. M.

[Testimony of W. T. Holcomb—Cross-examination.]

Mr. W. T. HOLCOMB, called for further cross-examination, testified as follows:

Mr. BROWN.—(Q.) Mr. Holcomb, have you the data showing the revenue arising from the sale of the pelts, and the expense connected with the sale of the pelts? A. Yes, sir I have.

The COURT.—This is simply further cross-examination?

Mr. BROWN.—Yes. It was agreed by counsel that this is direct-examination in behalf of the defendant.

Q. You have already stated that the gross amount received per pelt was ninety cents; will you now state the several items of expense?

A. Yes, sir. The skinning and handling of the pelts, and disposing of the carcasses, was \$401.54; and the freight from Millers Station to the stock-yards in California was \$234.35.

Q. What is the aggregate of those two amounts?

A. \$635.89.

Mr. BROWN.—That is all.

By Mr. SUMMERFIELD.—(Q.) What is the number of pelts?

A. The number of pelts that were received at the stock-yards was 1082.

(Testimony of W. T. Holcomb.)

Q. How do you account for the difference between 1082 and 1090 head lost there?

A. I believe there were a few lost before they were shipped, and some probably was not fit to ship, or something; might have been a few lost in handling on the road.

Q. What was the gross amount, if you have that?

A. \$973.80.

Q. Then deducting the \$635.00, what is that difference; I thought you already had it carried out; what is the net? A. \$337.91.

Mr. SUMMERFIELD.—That is all.

Mr. BROWN.—That is all.

[Testimony of Charles H. Los Kamp, for Defendant.]

[219] Mr. CHARLES H. LOS KAMP, called as a witness on behalf of Defendant, having been sworn, testified as follows:

Direct Examination by Mr. BROWN.

Q. State your name.

A. Charles H. Los Kamp.

Q. Where do you reside? A. Millers, Nevada.

Q. How long have you lived there?

A. Six years.

Q. You are the pump-man in the employ of the Desert Power and Mill Company? A. I am.

Q. How long have you held that position?

A. Six years in February first.

The COURT.—(Q.) Six years next February?

A. February 1st.

Mr. BROWN.—(Q.) You were the pump-man on

(Testimony of Charles H. Los Kamp.)

February 5th, 1914? A. I was.

Q. Where is your residence?

A. Opposite the pump-house.

Q. And how long has that been your residence?

A. Within three months of six years.

Q. Do you remember a band of sheep coming in the immediate vicinity of your residence on February 5th, 1914? A. I do.

Q. Will you proceed and state the circumstances in your own words?

A. I was in the act of preparing my noon meal, and I heard the bell, and supposing it was my prospector coming in, who was due, I went to the window to see, and noticed a band of sheep coming right in front of my window into the water; I threw the door open, turned around the corner, and hollered to the Mexican that was right back of the sheep, "What are you doing here?" He says, "Aint the water good to drink?" I says, "It rained in here." The sheep was going past the garden, over toward the slime ponds. I says to the Mexican, "Get through the garden as soon as you can and stop those sheep." I followed him up right away, and the both of us did all [220] we could to drive them sheep back; as soon as we got them back and over away from the water, he says, "Run up and tell my man, he is in the saloon." I ran up as fast as I could, I went to the saloon door and called out, "Is the sheep-man here?" The man got up and came out, and I says, "Your sheep are dying by the hundreds down by the well"; he started and ran down; I went then to the mess-house, saw

(Testimony of Charles H. Los Kamp.)

Mr. Barry, and got him to telephone for Mr. Heydenfelt. I then went down to the well, and as I got down to the well the same sheep-man was talking to his herder, standing a little below the house; he says, "Are you the man that told my man that this water was fit to drink?" I told him that it had rained in there; he says, "Are you the man that works for the company?" I says, "I am." He says, "That settles it," and walked up the road. As I went over to get my mail the Mexican says, "My boss did tell me to bring the sheep down here."

Q. When you first came out of your house and called to the herder, and said, "What are you doing here?" were any of the sheep in the water at that time?

A. Why, yes, they were strung out here; there must have been four hundred or five hundred of them drinking.

Q. At that time? A. At that time.

Q. Was it possible to prevent those sheep from drinking water at any time after you came out of the house? A. Why, utterly impossible.

Q. Did the herder speak to you in English?

A. Yes.

Q. Did he use fairly good English?

A. Fairly good English.

Q. During the time that you have resided at Millers, state whether herds have been through that immediate vicinity, of whether they have avoided it.

[221] Mr. SUMMERLAND.—I object, if your

(Testimony of Charles H. Los Kamp.)

Honor please, upon the ground any answer responsive to this question is utterly immaterial to any issue in this case. If there is any issue that is tendered that would come within the law as to any custom previously existing in the country, I am unable to comprehend it.

The COURT.—It will be the same ruling as before, and you will have an exception for the same reasons you have given before, and what you have already stated.

Mr. SUMMERFIELD.—Very well.

Mr. BROWN.—You may answer the question.

A. The first year I was there, the man previous to me had given two steers and two calves drink there at the well, that had strayed away from the—

The COURT.—(Q.) Do you know this of your own knowledge?

A. I know this of my own knowledge.

Q. Well, go on.

A. I ceased giving them water, and shortly after they left there, and since that time I have never seen any cattle around that section except one steer that Mr. Fickes had, and that is over considerable from where the well is.

Mr. BROWN.—You may cross-examine.

Cross-examination.

Mr. SANDERS.—(Q.) Tell us exactly where the sheep got into the water.

A. The water came up within fifty feet of where my cabin is, and from there to below the garden and around the corner of the garden, the water lay.

(Testimony of Charles H. Los Kamp.)

Q. That was on what side of the road?

A. Right in the wagon track of the road.

Q. Did any extend on the west side of it?

A. Of the road?

[222] Q. Yes.

A. Down below the garden it does a little.

Q. And did the sheep succeed in getting across the road at all? A. They did below the garden.

Q. Now, when you speak of "below the garden," is that on the east side of the road or on the west side? A. North.

Q. What? A. North of the garden.

Q. North of the garden the road is?

A. It winds around the north of the garden.

Q. Well, your garden and chicken-house is on the east side of the road, as you go to the north.

A. The chicken-house is, but the garden is not; it is on the side where the well-house is.

Q. Well, you said that some of the sheep had gotten across into the garden.

A. As they kept moving, they didn't get in the garden, because I have got it fenced but they went around the lower side of the garden.

Q. Well, was there any water along there?

A. Very little, just in one wagon track like.

Q. The fact is, all of this water was right in the wagon ruts, was it?

A. In the wagon ruts, and the lower part of the garden, where it is more level it spread out a little, too.

(Testimony of Charles H. Los Kamp.)

Q. Now, how many got across the road, do you know? A. I should judge there was five hundred.

Q. And they all drank out of the water on the opposite side next to the garden?

A. They couldn't; there wasn't room for them to drink.

Q. The fact is, those that got across the road only had one little puddle to drink out of.

A. There was no puddle across the road, but right in the wagon rut.

Q. Right in the wagon rut? A. Yes, sir.

Q. How long had that water been there?

A. Two weeks or more.

[223] What was the source of it?

A. The rain drains all the way down the road, and the flat naturally doesn't leak any in winter-time; the water will lay there.

Q. The water had been accumulating there about two weeks. A. Two weeks.

Q. Had cyanide been running into it?

A. I don't know; I wasn't aware of it.

Q. Had you ever made any investigations as to whether cyanide had ever run into there before this time? A. I had not, I had no occasion.

Q. It was your judgment, then, that this was rain-water. A. Rain-water.

Q. And if it was poisoned you didn't know anything about it? A. I did not.

Q. You speak of a conversation which you had there with two men, who was it you said rain-water to?

(Testimony of Charles H. Los Kamp.)

A. First to the Mexican; then when the sheepherder asked me,—or sheepboss asked me, I said it was rain-water.

Q. Both to the shepherd and to the boss, you said it was rain-water? A. I did.

Q. You also said that up in the saloon, or do you recall that?

A. I didn't say anything about rain-water there.

Q. You did not? A. No, sir.

Q. Did you ever have any talk with Mr. Riley or Mr. Canda, and say that was rain-water down there on the flat? A. No, sir.

Q. And these sheep were strung out a distance of how far along the road?

A. I should judge in the neighborhood of,—in a circle like they are, of a hundred or two or three hundred feet.

Q. How many of them were lying on the west side of the road as you go north, do you remember, or did you notice, of the tracks, the wagon tracks?

A. At what time?

[224] Q. Well, at the time they were supposed to have been all dead that were going to die.

A. I should judge fifty to seventy-five, perhaps.

Q. Tell us how these sheep died, Mr. Los Kamp.

A. Well, they would lay down, and some of them blatted a little.

Q. Had any of them dropped before you rushed to the saloon?

A. Why, yes; they were dropping when we was driving them back.

(Testimony of Charles H. Los Kamp.)

Q. Some had dropped before you left, and others dropped as you came back?

A. As we were driving them back, I seen them falling, and it was our efforts to get them back quick.

Q. Was that before you started to the saloon, or after you came back?

A. That was before I started to the saloon.

Q. The sheep commenced to drop, then, before you started to the saloon? A. Yes.

Q. You went there at that time to help the herder drive them back from the road? A. I did.

Q. In what direction?

A. From the west toward the east.

Q. Was that the direction they came in to the road?

A. They came from the east to the west.

Q. How far away were the sheep when your attention was first called to them, how far away were they from the road? A. They were right on the road.

Q. Where was the herder?

A. Right in the rear of the sheep.

Q. Do you recall whether or not the herder approached you before the sheep had gotten right into the road? A. He had not.

Q. Did he at any time say anything to you at or about the time that the sheep got to the water?

A. He did not.

Q. Did he address any remark to you at all?

A. Nothing only, "Is the water fit to drink?" in answer to my question, "What are you doing here?"

(Testimony of Charles H. Los Kamp.)

Q. He did ask you, then, about the water, and you said it was rain-water? [225]

A. I said it was rain-water.

Q. You have been there operating that pump for how many years?

A. Five years and nine months.

Q. Five years and nine months. Was it a custom for any water to escape from the operation of the well there at all? A. It would not.

Q. Had there been any accumulations of slime water at that point? A. Not to my knowledge.

Q. How far did the slime water extend on the west side of the road up towards the pond, if any?

A. I could not see because it always laid full of water from my house clean into the Crow Springs road whenever it rained; that was the last place the water lay.

Q. Then, there never had been, as far as you know, any water lay on the west side of the road between that point and the slime-pond?

A. Only in years past, whenever it rained.

Q. Whenever it rained; there was then no accumulation of slime water between the point where the sheep fell and the pond? A. Not any.

Q. And how do you account for this water being impregnated with cyanide, supposing that it was cyanide that killed the sheep?

A. Well, it might happen through the blowing of the winds, blowing the dust in that direction from the slimes; it may have happened by the rains, raining from the slimes, and working down that way.

(Testimony of Charles H. Los Kamp.)

Q. As a matter of fact, it got there from one of two causes, either the dust, or by its working its way out of the slime-pond down onto the flat and into the road? A. Yes.

Q. That has been going on for a period of how many years? A. Well, I could not say exactly.

Q. When was the slime-pond erected, if you recall? A. Previous to my time.

[226] Previous to your time? A. Yes.

Q. Now, where did you say were the sheep when you first heard the bell, and looked out of the window? A. Right in the edge of the road, drinking.

Q. How long had they been there?

A. How long had they been there?

Q. Yes.

A. They were just in the act of moving up.

Q. You were preparing dinner at the time?

A. I was preparing dinner.

Q. Was there anything there that would have obstructed your hearing, any sound of bells, dogs, or anything of that kind, before you heard this bell that you speak of?

A. Well, my kitchen is inside, with a hall between me and the outside.

Q. But the first time you heard the sound of a bell was when you saw the sheep on the road?

A. Yes, expecting my prospector coming in, that called my attention.

Q. Can you give us any reason why it was that you hadn't heard it before that time?

(Testimony of Charles H. Los Kamp.)

A. Well, because the house faces the northwest on that side.

Q. You knew of the sheep being in the neighborhood? A. No, sir—had I what?

Q. Had you seen the sheep before that morning?

A. I had not.

Mr. SANDERS.—That is all.

Redirect Examination.

Mr. BROWN.—(Q.) After you came out of the house, Mr. Los Kamp, how soon did you start to drive the sheep back? A. I should say three minutes.

Q. When they started across the road and you started to turn them, [227] back?

A. As soon as I seen where they were headed for, I got action to get them back.

Q. If you had said to the herder that that was cyanide water, what chance would there have been to save those sheep?

A. No chance whatever; without a larger force of men we could not have saved them.

Q. In answer to the herder's question, did you say that it was rain-water, or did you say, "It has rained in there"? A. I said it had rained in there.

Q. On the left side of the road, and between the road and the pond, there is a grade there, is there not, some grade, some slope?

A. A little grade, yes.

Q. That being a grade there, could the slimes accumulate there? A. Could they?

Q. Yes; I mean when any liquid formed, or would

(Testimony of Charles H. Los Kamp.)

they run off from that particular portion of the ground?

A. Well, I think not; I think they would come to rest.

Q. You are not certain about that?

A. I ain't certain about that, as I don't know the exact grade of the ground.

Q. Now, in the immediate vicinity of your house, and in the immediate vicinity of where the sheep were killed, wagon tracks and wagon ruts cover a space how wide on the ground, from one extreme side to the other?

A. Opposite the garden to the east?

Q. Well, in the immediate vicinity of where the sheep were killed. There are several roads there, aren't there? A. There are.

Q. Now, from the rut farthest on one side to the rut farthest on the other side, is a distance how far across?

A. I should judge five feet eight inches, or five feet.

Q. I mean from the furthest rut on this side to the furthest rut [228] on the other side, what is the extreme width of ground or territory there that is covered by different wagon ruts?

A. I should judge three hundred feet.

Q. Those ruts are well defined?

A. Not so well as the one that goes to Crow Springs, being the main travel.

Q. But that whole width of country there is used for travel, is it?

(Testimony of Charles H. Los Kamp.)

A. It is more used to go to Liberty and the Pole Mines, also out to Midway.

Q. How many well-defined roads? A. Three.

Q. Three well defined roads?

A. Yes, not right there; they all start and branch from one road out to three.

The COURT.—Those are the roads that are shown on the map, are they not?

Mr. BROWN.—Yes.

Mr. SUMMERFIELD.—That is my understanding.

Mr. SANDERS.—That is all.

Mr. BROWN.—That is all.

By the COURT.—(Q.) Now, Mr. Los Kamp, when you were speaking about from the rut on one side to the rut on the other side of the road was three hundred feet, do you mean a road going north and south, or the road going toward the northwest?

A. One to the northwest, and two north.

Q. Do you understand the map on the board? I wish you would step to the board there, and see if you do, and if you can, point them out. (Witness goes to map.) Point to what you meant when you were speaking of the three hundred feet from rut to rut.

A. Across here (indicating on Plaintiff's Exhibit "A"), right across here.

The COURT.—That is all.

[229] Mr. BROWN.—If the Court please, we subpoenaed Mrs. Fickes, but will not call her; she has a very serious impediment in her speech, and I

(Testimony of Charles H. Los Kamp.)

apprehend we could not use her at all as a witness, and that is the reason I have not called her. I, myself, am practically unable to understand her except through the intermediary of her husband. That is my explanation of why we have not called her. I will call Mr. Laizure.

[Testimony of C. McK. Laizure, for Defendant.]

Mr. C. McK. LAIZURE, called as a witness on behalf of defendant, having been sworn, testified as follows:

Direct Examination by Mr. BROWN.

Q. Will you state your name?

A. Clyde McKeever Laizure.

Q. Where do you reside?

A. At Millers, Nevada.

Q. How long have you resided there?

A. Since December 3d, 1905.

Q. What is your business or profession?

A. I am a civil and mining engineer.

Q. Where did you have your university training?

A. At the Missouri School of Mines and Metallurgy at Rolla, Missouri.

Q. You are employed by the Desert Power and Mill Company at the present time? A. Yes.

Q. And have been for how long?

A. Since 1908, about May, 1908.

Q. In what capacity are you employed there?

A. At the present time I am shift-boss in the cyanide mill.

Q. And before you were employed by the Desert

(Testimony of C. McK. Laizure.)

Power and Mill Company [230] by whom were you employed at Millers?

A. Charles C. Moore and Company.

Q. Who were Charles C. Moore and Company?

A. Engineers and contractors; they are the people who built the power plant and mill at Millers.

Q. You were engaged upon the construction of that plant? A. Yes, sir.

Q. I call your attention to a map upon the board, did you make the map? A. Yes, sir.

Q. What would you say as to the correctness of the data shown upon the map? Is that map correct?

A. I think it is correct.

Q. What does the yellow color—

The COURT.—Before you ask that, which is north and which is south on the map?

A. The north is to the top, south is the bottom.

(Testimony of Charles H. Los Kamp.)

Mr. BROWN.—(Q.) What does the yellow colored segment indicate?

A. That represents the sand dump from the mill.

Q. And is in the immediate vicinity of the mill?

A. Yes, sir.

Q. What is the appearance of the sand dup physically?

A. Well, it is a comb-shaped pile of sand put out there on a Bell conveyer.

Q. How high is the top of the sand-pile above the surrounding surface?

A. I judge about one hundred and forty or fifty feet.

(Testimony of C. McK. Laizure.)

Q. Will you now explain the colors that are in reddish brown, lying immediately north and surrounding the sand-pile?

A. Well, that represents the slime dump, or slime tailings from the mill.

The COURT.—(Q.) The reddish brown is slime tailings?

A. Yes, sir.

Mr. BROWN.—(Q.) Have you anything on this map indicating the [231] boundaries of the impounding of those tailings?

A. Well, the dark line around the edge represents the dam.

Q. I will ask you to step to the map, Mr. Laizure, and indicate on the map the boundaries of the tailings pond or dams.

A. Well, it is somewhat terraced; these lines here represent the boundaries of the slime-pond.

Q. The darker color that is beyond the dams,—will you point to the general area covered by the darker color? I don't know as your Honor can appreciate the distinction of these colors from that distance, but it has some significance.

A. This here is darker than this inside; this represents dry slimes.

The COURT.—(Q.) The darker represents the dry slimes? A. Yes, the dry slimes.

Mr. BROWN.—(Q.) And how do the darker dry slimes get out into that territory?

A. Well, they have accumulated there through leaks in this dam, let a little bit out, and as soon as

(Testimony of C. McK. Laizure.)

the water evaporates, it remains there.

Q. And dries? A. Dries up.

Q. How often do you have leaks in those dams, and state something of the conditions under which those leaks occur, how they occur, and their general physical characteristics, and all the information you can give the Court about leakages.

A. Well, the slime is discharged in here; it runs out against these banks; it makes various trails through here, and men working on this pond keep up the banks, they fill up a bank over here, and then turn the flow this way, and then go over on this side and work, and build up a bank; and when this side gets full, they turn it over here; and in time these are built up with stuff-mud dams, and when it dries out it forms small cracks in through it, and if any of those tailings coming out start through these cracks, it will wash [232] a hole out there, unless it is stopped up immediately.

The COURT.—(Q.) Do those cracks extend clear to the edge of the dam?

A. Just through the top, it is not very wide.

Q. What I wanted to know is whether those cracks made openings in the outer boundaries of the dam?

A. Yes, they go right through.

Mr. BROWN.—(Q.) Now, what do you do to prevent those breaks, or repair them after they are made?

A. Well, when they are discovered, they start to plug up the hole, fill it up with fresh soft slime, and turn the flow away; if it is very bad so they can't

(Testimony of C. McK. Laizure.)

stop it up right away, they turn the flow in the other direction, and build it up new.

Q. What is slime, is it a mud?

A. It is a very fine mud—yes, it is a mud.

Q. What would you say as to the adaptability of using that kind of mud for that purpose?

A. Well, it is very good material, I think, it packs up; slime itself is impervious, you know, to water; it is just merely a case of getting it tight, and it will hold.

Q. Have you any other available material that would be better for the purpose?

A. No, I don't know of anything available that would do as well.

Q. What do these channels that run north from the outer boundary of the dam indicate?

A. These channels here indicate a couple of leaks at the time the map was made, where it had run out before it dried out like this here; they were still wet.

The COURT.—Give that again; I didn't hear it.

A. These channels here represent the flow from a couple of breaks in the dam that are not dried up like this; they were fresh at the time this map was made.

Mr. BROWN.—(Q.) When did you make this map?

[233] A. That was made from the 11th to the 14th of February, 1914.

Q. Are there other channels in the immediate vicinity that are not shown upon the map?

A. Well, very small, old, dried-up channels, there is a little one right along here (indicating).

(Testimony of C. McK. Laizure.)

Q. And those two channels that are delineated, were left there for the purpose of showing them as fresh channels? A. Fresh.

Q. At the time the map was made?

A. Yes, sir.

Q. Does that dam always break in one particular place or places, or is it liable to break in different places?

A. It is liable to break in different places.

Q. And is that a recurrent condition that you have to contend with constantly?

A. Yes, sir, it is watched all the time for breaks.

Q. Do you employ men for that purpose?

A. Employ them to work on it and watch for breaks.

Q. How constantly do you have men employed for that purpose?

A. There is men on there all day, every day shift.

Q. And how long has it been the practice to have those men there for that purpose?

A. I do not recollect any time when there has not been men employed on that.

Q. What do the outer longitudinal red lines indicate that run parallel with the lines of that public survey?

A. These lines around here represent the boundaries of the Tonopah Mining Company's property at Millers—Desert Power and Mill Company, I should say.

Q. On the legend on the right hand side of the map there is a small section outlined in red, hatched in

(Testimony of C. McK. Laizure.)

red, what does that indicate?

A. That represents their property on the map of the township.

Q. And does this map, and does that legend on the right-hand side show the township, range and section and quarter sections of the property owned by the defendant company? A. Yes, sir.

[234] Q. I referred a moment ago to the legend; the legend proper is in the lower right-hand corner of the map; my reference was to the township plat further up on that.

A. I understood that was the place.

Q. Have you indicated on the map the course taken by the sheep on the 5th day of February, 1914? A. Yes, sir.

Q. How have you indicated that?

A. By this double dotted line around here.

Q. Have you shown the position of the sheepherder's camp?

A. Yes, sir; it is marked here "Shepherd's camp."

Q. On both the right and the left side of the mill you have marked "cottages," what are those cottages?

A. They are company cottages, owned by the Desert Power and Mill Company—residences.

Q. Who reside in those residences?

A. Well, various employees of the company, and some others who are not employees, living at Millers, reside in these, and the same over here.

Q. Live there with their families?

(Testimony of C. McK. Laizure.)

A. Yes, sir.

Q. Where is the postoffice?

A. The postoffice is located here in this store.

Q. Marked "Store and P. O."? A. Yes.

Q. Have you indicated the main line of the T. & G. Railroad? A. Yes, sir, this heavy dotted line.

Q. Where is the railroad station?

A. The railroad station is not shown on the map, but it is located right in here (indicating).

Q. Will you put the letter "A" there in pencil?

(Witness marks the point with the letter "A.")

Q. With reference to the hundred-stamp mill of the defendant company, where is the main portion of the town situated?

[235] A. I consider this portion including this, and the one on this side of the track, is the main portion.

Q. That would be how far from the stamp-mill, approximately?

The COURT.—You had better have the witness indicate it in pencil.

Mr. BROWN.—(Q.) I wish you would indicate by a pencil circle the general locus of the main portion of the town.

(Witness draws pencil line on map.)

Q. Now, is there some portion of the town that is outside of that segment?

A. There is another portion of the town down around in this section (indicating).

Q. North and northeast of the postoffice?

A. Yes, sir.

(Testimony of C. McK. Laizure.)

Q. Will you indicate that with a circle?

(Witness indicates point with a circle on the map.)

Q. From the sheep camp how long a radius line would it take to embrace the town?

A. I should think about three thousand feet.

Q. How long a radius line from the postoffice would it take to embrace the town, and also to embrace the movement of the sheep on February 5th?

A. About thirty-five hundred feet.

The COURT.—(Q.) Did you say three thousand feet would embrace the town?

A. From the sheep camp.

Q. Would embrace the town; and thirty-five hundred feet would embrace the postoffice?

A. From the postoffice to around where the sheep were.

Mr. SANDERS.—That is the nearest point at which the sheep were?

The COURT.—I don't quite understand that. From the sheep camp three thousand feet would embrace the town?

A. Three thousand.

Q. And you take thirty-five hundred to embrace the postoffice?

A. Out to the farthest place that the sheep trail was from the town.

[236] Mr. BROWN.—(Q.) From the postoffice to the extreme point of the sheep trail. The map is drawn to scale? A. Yes, sir.

Q. All distances can be computed from the map?

(Testimony of C. McK. Laizure.)

A. Yes, sir.

Q. What is the population of Millers?

A. I should say two hundred and fifty.

Q. How many employees at the Desert Mill?

A. Between seventy and seventy-five.

Q. How many at the Belmont Mill?

A. I could not say.

Q. Approximately?

A. I should judge about forty.

Q. What other industries are there, if any, beside the milling industry at Millers?

A. Practically none.

Q. What was at Millers before the mills were constructed? A. A well and pumping-plant.

Q. And what was that for, what purpose?

A. To furnish water for the railroad company.

Q. And prior to that time what was there?

A. I don't know.

Q. Basing your answer upon your experience in the mining industry, what improvement could be employed by the Desert Power and Mill Company in improving the construction of its dams, and what improvement could be employed in maintaining those dams, and preventing leakages, if you know of any?

A. Well, the only improvement I could see would simply be to keep such a force out there all the time that there would never be a chance for anything to get ahead of—or to get away.

Q. How many men would that require; would it require an unreasonable number of men?

(Testimony of C. McK. Laizure.)

A. Well, I think it would to prevent absolutely any leakage.

Q. What is the effect of freezing and thaw upon the dams?

A. Well, it is about the worst thing we have to contend with; it has a very disintegrating effect on the dam.

[237] Q. Can you explain that with a little more particularity to the Court?

A. Well, the freezing of the slime, hard slime without any moisture, if it freezes it expands and cracks; of course that loosens it up; it has to be worked up again into a smooth surface.

Q. Is there any way to avert the operation of those natural forces? A. I don't know of any.

Q. How thick are those slimes, those dried out slimes, that are north of the outer boundary of the dam?

A. Well, they vary in thickness anywheres from one, two, or three feet down to nothing.

Q. Well, how thick is it immediately outside the dam?

A. I should think eighteen inches would be an average.

Q. About eighteen inches; and then does it taper from there on out to the north? A. Yes, sir.

Q. And tapers down to what thickness?

A. Down till it disappears to nothing.

Q. How high is the dam proper?

A. I never measured it; I should judge between

(Testimony of C. McK. Laizure.)

thirty and forty feet, from the original surface of the ground.

Q. Well, the outer dam is not as high as the inner dam, is it? A. This is the highest.

Q. That is the inner dam? A. The inner dam.

Q. How high would you say that is; is that the height that you just gave? A. Yes, sir.

Q. Now, the outer dam is not as high as that, is it? A. No, sir.

Q. How high is the outer dam?

A. About eight or ten feet, I should think.

Q. Have you ever seen stress of weather—I mean the effect of freeze and thaw—break the inner dam? [238] A. Yes, I have seen it.

Q. And the inner dam is thicker than the outer dam, isn't it? A. Yes, sir.

Q. What is the usual method of constructing dams for these purposes?

A. Well, the usual method is simply to throw up the slime; after it reaches a certain consistency, it makes a very thick paste, and they throw up and build up a dam construction two or three feet wide on the inside, build it up with that, and fill in behind.

Q. The same process construction that was used here? A. Yes, sir.

Q. That is the general method of constructing these dams?

A. That is the only method I have ever seen followed.

Q. When was the town of Millers established?

(Testimony of C. McK. Laizure.)

A. The postoffice was established about 1907; the first store was opened then.

Q. Basing your answer upon your several years' residence, experience and activity in and about Millers, what would you say as to whether or nay the herds avoid that immediate locality or not?

Mr. SUMMERFIELD.—I object, if your Honor please, on the ground any answer would be irresponsible to any issue in this case, and immaterial.

The COURT.—It will be the same ruling, the same exception, and for the same reasons given heretofore.

Mr. SUMMERFIELD.—I further suggest that he has not been asked if he knows anything about it, either.

Mr. BROWN.—Well, if you can answer of your own knowledge.

WITNESS.—Will you repeat the question?

(The reporter reads the question.)

[239] The COURT.—To that question is added your own knowledge as well as your own experience.

WITNESS.—Herded cattle?

Mr. BROWN.—Yes, cattle or sheep.

A. I think they avoid it.

Q. Have you ever seen any in there in that immediate vicinity?

A. I have seen no herds except this one that were cyanided.

Mr. BROWN.—We offer the map, if the Court please, and ask that it be marked Defendant's Exhibit No. 1.

(Testimony of C. McK. Laizure.)

The COURT.—If there is no objection it will be admitted.

Mr. SANDERS.—No objection.

(The map is admitted in evidence, and marked Defendant's Exhibit No. 1.)

Mr. BROWN.—(Q.) What do the figures in red on various portions of the map, and more particularly surrounding the area in color, indicate?

A. They indicate the relative elevation of the ground at those points.

Q. What do they indicate as to the direction of slope from the outer boundary of the pond, north-erly?

A. Well, the general direction of the slope is in this direction, and this direction (indicating on map); you can compare any of the figures—there is 66, there is 69; they will slope down that way, and the same this way; the whole general slope is in this direction.

Mr. EVANS.—(Q.) Now, Mr. Laizure, those numbers, I believe, are in the seventies, with points and figures afterwards; what did you use as the data for those figures? A. A hundred feet.

Q. Where was that hundred datum?

A. That was a concrete pier on the corner of this building here.

Mr. BROWN.—(Q.) The green shading indicates what?

A. This green and yellow shading indicates sage-brush; the heavier [240] shading the higher

(Testimony of C. McK. Laizure.)

ground, and as it thins out, lower.

Q. What else is there in the way of vegetation besides sagebrush?

A. Well, there is greasewood and sagebrush.

Q. And what is the relative height of those two?

A. About a foot to two feet.

Q. Has there any sagebrush grown in the overflow or discharge from the dam?

A. Yes, there is sagebrush in through all this dry section.

Q. There is not much there, is there?

A. Not a great deal.

Mr. BROWN.—You may cross-examine.

By the COURT.—(Q.) The main map is two hundred feet to the inch? A. Yes, sir.

Q. This ground that is in red, is that the company's property? A. Yes, sir.

Q. What is this white spot up above?

A. All of this in the red lines is the company's property.

Q. What is the significance of that?

A. This shaded portion is what is shown here.

Q. And the white is above the surface of this map?

A. Yes.

Cross-examination.

Mr. SANDERS.—(Q.) What is the fall from the outer edge of the deeper line survey to indicate the outer dam, to the point marked "house" and "wells," and the blue immediately in the vicinity of those points?

(Testimony of C. McK. Laizure.)

A. It is ten feet in there, between this point here and that one down there (indicating on map).

Q. Is it from point signified by the middle heavy line surveyed, as you say, to indicate the seepage of or breaking of the dam?

A. Well, that is about the nearest elevation I have to that point there.

[241] Q. Would it be about the same?

A. It would be very nearly the same.

Q. Now, can you say from your work on that map, and from your observations upon which it was based, whether or not the course or direction of the flow, or the overflow, or the seepage of the dam or tailings, took a northwesterly direction, or easterly and northeasterly direction, as the natural flow?

A. Well, in this case it took both directions.

Q. Most of them, though, flow to the northwest?

A. Well, there is just about as much overflow here as here; this is all accumulation here; you see when it overflows this way and dries up, it leaves this ground, and naturally fills up and flows the other way a while.

Q. It never yet has extended to the public road?

A. No, except right in here (indicating).

Q. Except right at that point. And the company has been careful to observe, hasn't it, that none of this slime or seepage extends into the public road, or to the pump-house, or to the place marked "Well"?

A. Well, they have always tried to hold it inside of this dam.

(Testimony of C. McK. Laizure.)

Q. For what purpose?

A. I presume because they wanted to have it there—

Q. (Intg.) The question is, do you know for what purpose?

A. I don't know, except I know they have always tried to hold them.

Q. You don't know whether it was for the purpose of caution or safety, or whether it was for the purpose of convenience, or whether it was for the purpose of commercialization?

A. I think the latter was the reason for keeping it there.

Q. But it has never been worked since it has been accumulated there?

A. Some of the surface has been worked.

Q. Now, there is an indication here of a heavy surface; is that a [242] leakage also at this point, and did the water escape at that point?

A. Right in here (indicating on map)?

Q. Yes, the tailings?

A. Probably in a former time.

Q. And also at a former time it escaped here (indicates on map)? A. Yes.

Q. And these were as far as you could see at the time, fresh breaks? A. Fresh breaks.

Q. And they extended clear on down to the road, as shown there? A. Yes, sir.

Q. And how long had they been in that condition, do you know?

(Testimony of C. McK. Laizure.)

A. I don't know exactly when those breaks did occur.

Q. Don't you know those breaks have been there practically continuously for a period covering at least thirty days, before the 5th of February, 1914?

A. I don't know.

Q. Don't you know it had been quite a rainy season, and that water had accumulated and stood practically all around on the surface of the company's property for a period of thirty days before the 5th of February?

A. I don't remember any continuous water standing out there for that length of time.

Q. There was water there, wasn't there?

A. There was some there at the time this map was made.

Q. And there was water in there before?

A. There may have been some.

Q. You would not say as to that now?

A. No, I would not say there was not.

Q. And did you ever observe any in there—ever pay any attention to it?

A. After any heavy rain we usually have water out in here.

Q. Now, this inner dam had served its purpose, and the slimes were [243] permitted to go over and commence to build up or to make another dam?

A. Yes, sir.

Q. And this dam here is how many feet higher than the outer dam?

(Testimony of C. McK. Laizure.)

A. Well, I think it is twenty or thirty feet high.

Q. That is the process, then, under which this whole settling-pond is made; the first one rose up to a height of twenty or thirty feet, when it answered its purpose there you let it drop down into here, and you expect to build them on and on as it accumulates?

A. You can't build them only a certain height on account of the discharge pipe; then it goes over here, then start another dam, and build up there, and as soon as that fills up, they build another.

Q. And as soon as it gets filled up to the point of discharge, you start another one down there?

A. Yes.

Q. Are there any signs or notices at all at the point where these wells are, or at the point where this postoffice is? A. Not that I know of.

Q. Is there any landmark or notice, other than the pond itself, to direct the attention of the general public as to the extent of the slimes?

A. No, sir, there is not.

Q. There are no slimes along the public road, so far as you have indicated?

A. Except right in here (indicating).

Q. That is where it touches that one particular road? A. That is all.

Q. Now, what is this place here, this tracing here at this point?

A. This represents the wagon-road.

Q. This represents the wagon-road from the post-

(Testimony of C. McK. Laizure.)

office? A. Yes, sir.

Q. Going out to this point, do you know where the sheep fell and were killed?

A. Right in there (indicating).

Q. They were killed on the public road?

[244] A. On this wagon-road here.

Q. Well, that is a public road, isn't it, so far as you know? A. As far as I know.

Q. And it has been there for a considerable number of years? A. Yes, sir.

Q. About how many, would you say?

A. Well, it has not been used very much except the last four or five years.

Q. Now, it accommodates the whole community, doesn't it?

A. Well, it accommodates the people out at the other end, I think, of the road.

Q. That is, the people that are coming into Millers and going out of Millers, and come from Tonopah on to Crow's Springs, and all around?

A. They go from Millers out this way from Crow's Springs.

Q. Now, here at the postoffice you have marked several houses, along down east of the postoffice, are they not? A. East and north.

Q. East and north, quite an accumulation of houses there?

A. Yes, there is quite a few in there.

Q. And from this store, you say that was established—the postoffice—in 1907; the town was estab-

(Testimony of C. McK. Laizure.)

lished, though, before that, wasn't it?

A. There was nothing there but the construction camp and the railway water-tank.

Q. Is the town platted and recorded, do you know? A. I do not know.

Q. Well, do you know how those people hold lots there, whether the title is in the company or whether it is in the owners of the houses?

A. They are all held by lease, I think.

Q. All held by a lease from the big company?

A. Yes.

Q. And it has been platted off into streets?

[245] A. Yes, the company has it platted.

Q. And the postoffice is on the main street?

A. No, the section that is platted is this section over here (indicating on map).

Q. Then this is not platted?

A. The Esmeralda Power Company may have it platted there, I don't know.

Q. And it has been used there, this outlet there has been used practically ever since you have known the town?

A. When I was there they simply rode from the well up to the camp, hauling supplies up.

Q. Where did you get the data to follow this track of the sheep? A. I followed the tracks.

Q. Yourself? A. Yes, sir.

Q. Then they circle away down below the switch?

A. Yes.

Q. How far is that from the postoffice where they

(Testimony of C. McK. Laizure.)

crossed the road?

A. It is thirty-three hundred feet from where this quarter section crosses, or thirty-five hundred feet would carry it from the postoffice.

Q. It crossed at a point thirty-five hundred feet east of the postoffice, and then circled out in a north-westerly direction to the point where they got onto the road? A. Yes, sir.

Q. Then they came back east, in an easterly direction, did they?

A. I don't know where they took them back.

Q. What is this line here (indicating)?

A. That is that wash; the dotted line is the sheep track.

Q. Now, were there any tracks of sheep across the road, that you noticed?

A. They were in the road, tracks in the road.

Q. Tracks in the road, but none across; I don't see any here.

A. Well, they were right in there; they crossed some tracks; the [246] road is all split up there into five or six tracks; it is not perfectly smooth in here; the road is split up into four or five different tracks.

Q. Now, this is sagebrush out here? A. Yes.

Q. How far is it from the outer slime-pond to the pond indicated by number 67?

A. Well, I will have to have the scale to tell you that.

Q. Did you calculate that, Mr. Moran?

(Testimony of C. McK. Laizure.)

Mr. MORAN.—Between my two points there it is eight hundred and fifty feet.

WITNESS.—(After measuring on map.) That measures about four inches; it would be eight hundred feet.

Q. Eight hundred feet? A. Approximately.

Q. Then these sheep fell eight hundred feet away from the tailing pond?

A. Yes, sir, about eight hundred feet.

Q. About eight hundred feet? A. Yes, sir.

Q. What is the distance, would you say, from the point where the sheep crossed the railroad track—you say thirty-five hundred feet east of the post-office? A. Yes, sir.

Q. Then what would be the distance to the point where they struck the road containing the water?

Mr. SUMMERFIELD.—You mean following the course?

Mr. SANDERS.—Following the course. (Witness measures on map.)

A. That would be about forty-six hundred feet, something like that.

The COURT.—Forty-six hundred feet from their camp?

Mr. SANDERS.—No, sir, from the point where they crossed the railroad track thirty-five hundred feet east of the postoffice.

The COURT.—To the point where they fell?

Mr. SANDERS.—To the point where they fell.

Q. What is the width and depth of the points in-

(Testimony of C. McK. Laizure.)

licated by the heavy coloring which you described as the breaking of the dam?

[247] A. You mean this here—the channels?

Q. The channels, yes; what is the depth and width of those channels?

A. I think at the time I looked at it about a foot wide.

Q. How deep?

A. Well, it was probably cut in about a foot.

The COURT.—I don't understand that.

A. I think they were about a foot wide, and cut in about a foot below the surface.

Q. A foot wide and a foot below the surface of the natural ground?

A. No, below the dry slime; you see they built up the edge.

Mr. SANDERS.—(Q.) You say the slime there at those points was eighteen inches?

A. On an average, eighteen inches.

Q. On an average of eighteen inches, on a gradual slope down to an infinitesimal amount, and at the point where they escaped from the pond, it has a depth of one foot wide and one foot deep?

A. That is my recollection of it.

Q. And that is about the same as to the extreme outer break as it was in the middle of the break here, pointed out on the map?

A. You mean out here where they spread out?

Q. Yes.

A. No, it spreads out here thirty or forty feet.

(Testimony of C. McK. Laizure.)

Q. But that channel of a foot continues on down, clear down to the edge of the slime?

A. Till it gets down to where it is flatter, then it spreads out; where this dry slime is thicker it stays in the channel, and when it gets down it spreads out over the surface, where it is thinner.

Q. Where it is exposed to the air it corrodes and becomes compact, and makes a very hard surface?

A. I don't understand that question.

Q. Well, that slime, that mud, becomes hard?

A. It dries hard.

Q. It dries hard and makes a very hard substance, does it not? [248] A. Yes.

Q. So hard that you consider it a good substance for dam purposes? A. Yes, sir.

Q. And that surface, as you described, was cut by the flow of this water out of the dam, from one foot wide to one foot deep? A. Yes, that was cut.

Q. Showing a continual flow, did it not, at the time, of slime through it?

A. It was flowing at this time.

Q. That was on what date?

A. Well, between the 11th and the 14th of February.

Q. Now, in answer to some of Mr. Brown's questions, you stated that the company had men, or a man, watching this dam, and you stated that it would require how many men to keep it from breaking through, if they watched it all the time?

A. Well, I don't know as I could say how many it would take all the time; it depends a good deal on

(Testimony of C. McK. Laizure.)

the time of the year and the amount of slime that is discharged, and the consistency of it.

Q. But, as a matter of fact, the company never has kept but one man there in that particular capacity?

A. Oh, yes, it often has more than that; I have been out there times at night, lots of times get up at night and go out with a lantern to look for leaks, and I have also sent for men, called men out to work on it, sometimes three or four, depending on the size of the leak, in an endeavor to hold it.

The COURT.—(Q.) Could three men take care of that? A. Could three men?

Q. Three men?

A. If they got a good enough start on it, sometimes they probably could; other times of the year they could not, after a storm it might take a hundred men; it collects all the rain-water that flows on it.

[249] Mr. SANDERS.—(Q.) Hadn't it been a rainy season up to the 5th of February, considerable storm and rain?

A. My recollection is that it had.

Q. And you never had but one man on that dam?

A. Had more than that.

Q. Well, you have had in the course of time, since your operations in the number of years you have stated; but did you have any more than one man on that dam at that time?

A. I think there were two or three on it at that time.

(Testimony of C. McK. Laizure.)

Q. Are you positive of that, or is that just what you want to say?

A. That is just my impression, I could not swear to it.

Q. Just your impression, you don't know?

A. I am on the night shift, and that is run by the day shift.

Q. You don't just know how many men they did have there, and if they had more than one, you don't know?

A. I don't know that.

Q. Now, from your knowledge of this substance called slime, couldn't it be better impounded by the use of levees of some kind, making a levee?

A. That is what I call that dam, a levee.

Q. That is a levee made out of slime; couldn't a levee be made out of the natural formation there, the earth and other substances?

A. There is nothing but sand there, and sand won't hold.

Q. Now, from your observation there, hasn't there been dirt thrown up here, or sand, or whatever it is, the substance of that soil, that would have filled up here and down here to the outer edge of this slime?

A. Sand thrown up here?

Q. Dirt of some kind, I don't know whether sand or mud, or what it was, but hasn't there been an embankment thrown out here?

A. When they first started it they scraped up the surface, and then they built up that slime; it is not a question of building, it is a [250] question of holding—it would not hold it.

(Testimony of C. McK. Laizure.)

Q. Haven't they tried to do it in that way, running furrows along, and throw the dirt up to keep it from getting down here?

A. Yes, they have scraped up here.

Q. Why not do that down there, and watch that; is there anything to prevent them from doing it?

A. There was some down here.

Q. Where was it? A. Along this side here.

Q. It didn't extend over into here, did it?

A. I don't think there is any embankment down there.

Q. Couldn't the company make an embankment there, such an embankment as would keep those slimes, after they had dissipated themselves in the manner you stated, from extending down into that road?

A. Why, I should think an embankment across here would do it.

Q. It would not require watching to hold it, would it, after they would sink down to this point, from eighteen inches down to nothing?

A. When they quit there, they would simply go out and hit the road here.

Q. That would be done by digging a furrow to hold it, if there is no force behind it.

A. It would hold it for a certain length of time.

Q. You don't mean to say they are trying to make another dam down here?

A. It will only be a question of time when there is a dam here.

(Testimony of C. McK. Laizure.)

Q. Only a question of time, and you could prevent their spreading out any further by a little surface ditch or little embankment, as you say?

A. Temporarily.

Q. Have you had any experience with slime dams, other than the one you have been talking about here?

A. Not with cyanide slime.

Mr. SANDERS.—That is all.

[251] Redirect Examination.

Mr. BROWN.—(Q.) Calling your attention to the channels, Mr. Laizure, you spoke of their width and their depth, now how is that depth made, by the flow carving down into depth, or by the sediment of the flow piling up and making an embankment on each side of the channel?

A. They build up their own walls; as that dries and forms there, it keeps building up.

Q. Then the depth is not accomplished by a process of cutting down into the earth, but by a process of piling up an embankment on each side?

A. Much more so, yes.

Q. When the seepage or overflow comes down through those channels, does it come with any particular force or power?

A. Why, not out here, it is very flat.

Q. Is it a gentle flow?

A. Gentle flow; it depends on the slope, of course; at some points it will speed up, and when it gets level it will go slow.

Mr. BROWN.—That is all.

(Testimony of C. McK. Laizure.)

Mr. SUMMERFIELD.—Might I ask just one question?

Q. I notice upon this map, Mr. Laizure, marked "Old fence line," a line extending east and west, or practically so, running between the slime-ponds, is there any fence there?

A. There is a little piece of it right in here now, that makes a barn, one side of a barn.

Q. That is all? A. That is all.

Q. How were you able then to locate that line?

A. I surveyed that fence and helped to put it in.

Q. When was it taken out, with the exception of just enough left to help constitute part of the framework of a barn?

A. Well, it was put up during construction time, when they first [252] started to work there; the first fence went around here, and that piece was taken out, and moved over here, and when the Belmont Mill was built, they put the fence around the Belmont Mill, and we afterwards took down the whole thing, and used the lumber for other construction work.

Q. This whole country delineated on this map was open, uninclosed country, was it?

A. Yes, it is all open.

Mr. BROWN.—(Q.) A fence put up by the constructors and builders? A. Yes.

Q. For purposes of their own?

A. Well, it was put up by the construction company.

(Testimony of C. McK. Laizure.)

Mr. SUMMERFIELD.—(Q.) That slime material that is used for the purpose of constructing these dams is kept wet all the time, is it not, by the liquid and wet slimes upon the inside?

A. A certain portion of it; just the surface, a small portion, it dries pretty rapidly.

Q. What is the depth, or average depth of the water or slimes themselves upon the inside of the dams?

A. You can walk all around, all over, except close to where it is discharging.

Q. Any accumulation of water from the slimes themselves accumulates around the inner surface of the dams, don't it? A. Yes, sir.

Q. And keeps to that extent, the dam material itself wet? A. Yes, sir.

Q. It then don't become dry and hard wherever that water accumulation occurs along the inside of the dam? A. Not while the water is on it.

Q. Well, there must be water on the inside of the dam whenever there is a break or a leakage, is there not?

A. Well, I explained, they switch around; when the slime is running [253] here they build up their dam here, and this dries out to a certain extent, and cracks.

Q. But wherever it is, if there is any break or leak there must be an accumulation of water on the inside of the dam in proximity to the leak, is not that correct? A. I think so.

Q. Has it ever been taken under consideration

(Testimony of C. McK. Laizure.)

within your knowledge there by the company, about putting in a core or either of those dams, either of cement or material similar thereto?

A. I don't think so.

Q. I believe you already said that you had had no personal experience with the construction or the material in use in any other slime-ponds, except those at those places you have indicated?

A. That is the only slime dam I have had anything to do with.

Mr. SUMMERFIELD.—I think that is all.

**[Testimony of Frederick F. Heydenfelt, for
Defendant.]**

[254] Mr. FREDERICK F. HEYDENFELT, called as a witness on behalf of defendant, after being sworn, testified as follows:

Direct Examination by Mr. BROWN.

Q. Will you state your name?

A. Frederick Freer Heydenfelt.

Q. Where do you reside, Mr. Heydenfelt?

A. Millers, Nevada.

Q. How long have you lived there?

A. Close to five years.

Q. You are superintendent of the defendant company?

A. Acting superintendent.

Q. You are the acting superintendent?

A. Yes, sir.

Q. How long have you been acting superintendent?

A. About two years and a half.

Q. Who is the superintendent?

(Testimony of Frederick F. Heydenfelt.)

A. Mr. A. R. Parsons.

Q. Has he performed any duties as superintendent during the time you have been acting superintendent? A. No, sir.

Q. He is absent on sick leave? A. Yes.

Q. And has been for how long?

A. About two years and a half.

Q. So that as acting superintendent you have been performing all the duties of superintendent?

A. Yes, sir.

Q. Do you know when Millers was established, the town of Millers, when it became a town?

A. No, sir.

Q. What industries are there at Millers?

A. The milling of ores and sampling of ores.

Q. Any industry there except what is connected with the mining and milling industry?

A. No, sir.

Q. What ores does the Desert Power and Mill Company handle?

A. They handle the ores of the Tonopah Mining Company of Tonopah, Nevada.

Q. Quartz ores? A. Quartz ores.

Q. What is the process of reduction employed by the defendant [255] company?

A. Crushing and stamp concentration, and cyanidization.

Q. What is the stamp capacity of the mill?

A. One hundred stamps.

Q. What is the tonnage that is passed through that plant?

(Testimony of Frederick F. Heydenfelt.)

A. The tonnage passed through the plant was five hundred tons per day of twenty-four hours, up until November of 1913, from that time to date there has been four hundred tons per day.

Q. Approximately what is the aggregate tonnage that has passed through that mill?

A. Something over two million tons.

Q. And the slimes and tailings from that tonnage are represented in the slime-ponds delineated upon the map?

A. In a sand-pile and slime-pond, which represent the residue from that amount of ore.

Q. How is the dam constructed?

A. It is constructed of the slime tailings, solid material contained in the discharge from the mill, and it is banked up, or levees built to retain the discharge from the mill to a confined area.

Q. What is the surface area of the inner dam as shown upon Defendant's Exhibit 1, approximately?

A. Approximately fifteen hundred feet in an east and west line, and about a thousand feet in a north and south line.

Q. The inner dam is a little over a quarter of a mile long? A. Yes, sir.

Q. And what is the linear length of the outer dam?

A. Probably be two thousand feet in an east and west line, and fifteen hundred feet in a north and south line; I am judging that from the proportions on the map.

Q. What would you say as to the suitability of the

(Testimony of Frederick F. Heydenfelt.)

materials that are used in the construction of those dams?

[256] A. I think they are very suitable for the purpose.

Q. Why do you say so?

A. Because they are more suitable than any material available at that place, and they hold the slimes very well for the purposes for which they are wanted.

Q. Do I understand that after a dam is built up with the wet material it is then allowed to dry as nearly as possible, or that the banks do become dry?

A. Yes, the banks do become dry.

Q. And in that dry condition what would you say as to their strength and efficiency for these purposes?

A. From our experience they have been strong enough to hold back the residue, and very efficient.

Q. Nevertheless, you do have leakages to contend with? A. Yes, sir.

Q. What is the cause of the leakages?

A. Well, there are various causes; if a crack occurs along the surface of the slimes, it might dry and work out through the embankment, maybe through a hundred feet of material, and the solutions will gradually seek their way into that crack—cause a slip and a break. Another reason is in cold weather the material freezes, when it is moist, freezes at night and in the daytime thaws out again, and it crumbles, disintegrates, and loosens up.

Q. What room for improvement is there in our method of constructing and our method of maintaining those dams?

(Testimony of Frederick F. Heydenfelt.)

A. I don't see any improvement could be made.

Q. What materials are there, if you know of any, that would be more suitable for the purpose?

A. I don't know of any materials that would be more suitable.

Q. What is the universal method, and what are the universal materials used, in the construction and maintenance of this class of dams?

[257] Mr. SUMMERFIELD.—I object, if the Court please, unless the witness testifies that he knows what the universal custom is, if it is a custom—that is pretty broad.

Mr. BROWN.—(Q.) How many years experience have you had in the mining and milling industry, and over what period of years have you a knowledge of the mining and milling industry, and more particularly in the State of Nevada?

A. About eight years.

Q. What portions of Nevada, what mining sections have you visited, observed and been familiar with during that period in Nevada?

A. Tonopah, Goldfield, Silver Peak, Bullfrog, Wonder, Fairview.

Q. Have you visited Manhattan?

A. I never visited Manhattan.

Q. Do you know and have you observed the manner and method and the material used in the construction of dams in those various mining centers?

A. I don't know of any dams being constructed in any of those mining centers, with the exception of our mill, the Desert Mill, prior to about two years

(Testimony of Frederick F. Heydenfelt.)

ago, when they started constructing dams at the Belmont Mill, at Millers, and at the Tonopah Mills in Tonopah.

Q. And prior to that time the milling industry did not employ dams, is that correct?

A. Not at those places.

Q. After they commenced to construct dams, what materials did they use?

A. They used the slimes themselves.

Q. What do you do to meet the conditions that arise from breaks and leaks in the dam, what do you do to handle that situation; how do you repair it, what means do you employ?

A. If a crack or break occurs in a dam, if it is small we fill it up with soft mud from the inside of the dam; if it is too large to handle in that way, we throw an inner dam around the break, on the material inside of the dam, and of the material of the inside of [258] the dam, then we would probably fill up the gap with the material after that inner dam was filled up.

Q. Do you employ men on the dam to watch the dam? A. Yes, sir.

Q. Is that a continuous practice? A. Yes.

Q. Not a recent practice? A. No, sir.

Q. Been continuous throughout your administration? A. Yes.

Q. You have men employed for that purpose?

A. Yes.

Q. And from time to time how many men do you employ in that kind of work?

(Testimony of Frederick F. Heydenfelt.)

A. We have from two to three men out there in the winter-time, and in the summer usually one man.

Q. From two to three in the winter-time?

A. Yes; sometimes we might have two or three men out there during the summer for a short period.

Q. What would be the reason for that in the summer-time?

A. Sometimes in the summer and spring of the year we have heavy rains, and it requires a little more labor to handle it then than it would during the dry seasons.

Q. Why do you have more men in the winter than in the summer as a rule?

A. On account of the freezing and thawing of the banks, and on account of the slower evaporation, the material does not dry out as fast, and cannot be worked to as great advantage as in the summer, and a man won't have as much time in the winter to give to dam embankment as he would in the summer, and the same amount of work would have to be done in approximately a third of the time; also to watch the thawing and freezing; there are more breaks occur in the winter than in the summer.

Q. More breaks occur in winter than in summer?

A. Yes.

Q. What is the effect of freeze and thaw on these dams?

A. It has a tendency to break them; freezing contracts and material at night especially; in the day-time it thaws out, expands and pushes [259] itself out of the banks, crumbles down; I go out in the

(Testimony of Frederick F. Heydenfelt.)

morning at ten or eleven o'clock, after a freezing night, and see the material crumbling all around the edge of the dam.

Q. You can see that?

A. We can see it; where a break might occur would not be indicated until it occurred; you cannot tell where it might come.

Q. A break might come and it would show no signs until it was through?

A. Show no signs until it would break.

Q. What weather conditions did you have the last half of January and the first five days in February, 1914?

A. Well, it was very cold weather at night; the days were fairly warm; there was ice on standing water in the morning.

Q. And the breaks that occurred at that time occurred from stress of weather? A. Yes, sir.

Q. Is there any way to avoid or avert those breaks? A. Not that I could see.

Q. None that you know of? A. No, sir.

Q. If it were insisted that an adequate force of men be put upon the dams and prevent those breaks, how many men would you consider that you would have to employ to prevent the breaks?

A. Well, we aim to keep enough men out there to prevent any serious breaks; if we knew where breaks were going to occur, or any indication of a break, we would put a man on right away; but the number of men required could not be determined; you could not say we could put any number of men

(Testimony of Frederick F. Heydenfelt.)

out there and prevent breaks occurring.

Q. What would you say is the linear distance of the dams, the maximum linear distance that is liable to breakage, swinging from the north or west side of the sand-pile, thence clear around almost a complete circle to the east side of the sand-pile; what is the linear distance there that would be liable to breakage, that would [260] have to be protected?

A. In that particular portion it would be between twenty-five hundred and three thousand feet; then there are several dams within that, all of which are worked and kept up.

Q. And if there was a break in the inner dam, that would flow into the outer dam, would it not?

A. Yes.

Q. So that the break in the inner dam would not flow out upon the uninclosed country, would it, is not that a fact; or is there a part of this inner dam where a break might flow out upon the uninclosed country?

A. There is.

Q. Well, including then the dams where a break through the dam might flow out on the country, I want to know the linear distance of dam that would have to be protected to avoid such break?

A. On the outer dam?

Q. Aggregating both the outer and inner; if there is a portion of the inner that might flood the southern country, or flow onto the southern country, if it broke?

A. Probably a mile of dam work represented in that area.

(Testimony of Frederick F. Heydenfelt.)

Q. How many men would you have to employ to protect a mile of dam? A. I don't know.

Q. Could you tell where to place them?

A. No, sir.

Q. What is the maximum width or depth of any dam there that you have known to suffer a break; what is the greatest depth of dam or width of dam that the slimes have broken through—have they broken through your heaviest dams as well as your lightest dams?

A. I have seen breaks occur where the material will come out of the bottom of a dam that was probably thirty or thirty-five feet high, and at the base it may be eighteen or twenty feet thick.

Q. You have seen breaks come through a dam of that character?

A. I have seen breaks come through a dam of that character.

Q. Now, when the break comes through, does it come with any special [261] or particular force or power, or is it a gentle flow?

A. It is a gentle flow, as a rule.

Q. Describe the method of making and building up these channels that are indicated upon Defendant's Exhibit "1."

A. The material as it is discharged from the mill is very thick and sluggish; we aim to send it out with as little moisture as possible on account of reducing the amount of chemicals lost mechanically—cyanide and other chemicals contained in the solution; and it necessarily flows very sluggishly; in passing out onto

(Testimony of Frederick F. Heydenfelt.)

a comparatively level piece of ground, such as the area represented by the overflow, and where the marks of the channels are, it spreads itself,—splashes in a tortuous course, and spills itself up on the sides, and forms a natural channel; probably the bottom of that channel would be level with the ground, or the dry slime that it started to flow on, and the banks would be of its own material. The same thing occurs in the dam proper within the embankments; the channels of the flow of material are always higher than the level on the outside of the channel, except right where it discharges from the end of the pipe with great velocity.

Q. Does it take time to build up those channels?

A. Yes. We might have a break, and follow one of those channels, and spill and bank itself up, and repairs were made to the break, why that material would dry, and the next break that occurred in or about the same place and struck the same channel, would spill some more wet material on top of the dry, building it up not only on the top but on the sides.

Q. The channels mentioned by Mr. Moran in his testimony, and described by him as fresh channels, would you say those were recent channels, or old channels with recent flow?

A. My observation of those channels led me to believe they were [262] old channels of recent flow.

Q. Did you make a panoramic photograph of the situation under discussion on or about the time of the accident? A. I did.

Q. Have you it with you?

(Testimony of Frederick F. Heydenfelt.)

A. I have. (Witness produces photograph.)

Q. You made the photograph?

A. Yes, sir, I made the exposures, and had the films developed and printed by a photographer.

Q. Does the photograph correctly represent the situation as it existed at that time? A. It does.

Q. What was the date that photograph was made?

A. The photographs were taken, printed, developed and finished between February 5th and 12th; I neglected to note the exact date of the exposure, but it was prior to the time of shipping the hides,—shortly after the skinning of the sheep.

Q. You began those exposures on February 5th?

A. As my memory serves me, these pictures were taken on February 7th or 8th.

Q. Do they practically represent the situation as it was on the 5th,—was there any material change?

A. No, sir.

Q. Did you make two such panoramic pictures?

A. Yes.

Q. And you make the same remarks with regard to the accuracy and correctness of both of them?

A. Yes, sir.

Mr. SUMMERFIELD.—These joined together, as I understand it, run from the east to the west?

Mr. BROWN.—I think that is correct.

Mr. SANDERS.—(Q.) Have you any picture of the sheep as they lay on the ground?

A. I believe there are some single exposures, pictures that I did not take myself.

(Testimony of Frederick F. Heydenfelt.)

Mr. SANDERS.—This is to illustrate his testimony?

Mr. BROWN.—And to give the Court a general idea of the physical [263] situation generally. We offer these, and ask that they be marked Defendant's Exhibits 2 and 3.

The COURT.—They will be admitted.

(The photographs are marked Defendant's Exhibits 2 and 3.)

WITNESS.—The shorter picture of the two, the one joined together by the clasps, is supposed to represent the closer view.

Mr. SUMMERFIELD.—(Q.) A portion of the latter is included in the former?

A. All of the latter is included in the former.

Mr. BROWN.—(Q.) Did you give the sheep-man any consent to go on our property? A. No, sir.

Q. With their band of sheep?

A. No, sir; in fact I didn't know that the sheep were there until they informed me at the noon hour that they were dead, or dying, up at the well.

Q. Did you investigate out beyond the pools near the pumping plant as to whether or nay there was additional water further north or east, available for sheep going out that way? A. Yes, sir.

Q. Upon what date did you make such investigation, and who was with you, if any person, at the time?

A. I think it was on February 6th, I have the date in my note-book, Mr. Holcomb and myself went out in my car to look over the country out there, and

(Testimony of Frederick F. Heydenfelt.)

see if there was any standing water, and to take samples of it, and determine whether it contained cyanide, so that he might know whether he would be safe in having the balance of his sheep, those that survived, driven out through that country in the direction of Crow's Springs.

Q. And how far north from the pumping plant did you go on that investigation?

A. Probably a mile.

Q. About a mile?

A. And we went west about two or three miles.

Q. And what water conditions did you find?

[264] A. The only water we found were some very small puddles in the road ruts, and on the flat, not in the road ruts, but in the chuck-holes in the road; they were so small that we had great effort in securing a quart bottle full for a sample, and we had to break the ice on top of it, in fact, I filled one bottle with chipped ice.

Q. Was there any cyanide on the south side of the railroad track that you know of?

A. Not that I know of.

Q. What would you say as to the safety of the south side of the track?

A. I would say it would be impossible for cyanide to get over there, as the natural trend is to the north of the mill, and not to the south.

Q. Did you talk at any time with the herder?

A. Yes.

Q. What knowledge of the English language did

(Testimony of Frederick F. Heydenfelt.)

he disclose when you talked to him?

A. He seemed to understand what I said, and he answered me in English.

Q. Answered you in English? A. Yes, sir.

Q. Did Messrs. Holcomb and Wheeler while in conversation with you at any time criticize McGarry for his handling of the sheep?

A. Well, Mr. Holcomb and Mr. Wheeler were in my office talking with me, and discussing the situation, and I asked them why in the world a man would ever take his sheep down to that point to give them water, after he had been warned that there was a danger there, and that he could get good water on the other side of the track, the south side; and either Mr. Holcomb or Mr. Wheeler—I think it was Mr. Holcomb—said that he didn't know, that they thought he would depend on snow in the foothills in a country of this character.

Q. Is there any railroad running in or out of Rawhide?

A. I am not familiar with the Rawhide district, I don't think there is.

[265] Q. Is there anything further you want to state to the Court that will help the Court in arriving at a knowledge of the conditions surrounding the operations there with reference to the pond, its construction and its maintenance, in addition to what you have stated? A. I think not.

Mr. BROWN.—You may cross-examine.

(An adjournment is taken at 4 o'clock until tomorrow, November 19th, 1914, at 10 o'clock A. M.)

(Testimony of Frederick F. Heydenfelt.)

[266] THURSDAY, NOVEMBER 19th, 1914.

COURT CONVENED. 10 A. M.

Cross-examination of Mr. FREDERICK F. HEYDENFELT.

Mr. SUMMERFIELD.—(Q.) Mr. Heydenfelt, how long have you been in the employ of the defendant company? A. About four years and a half.

Q. And during that time have you been at Millers?

A. Yes, sir.

Q. That has been your headquarters?

A. Yes, sir.

Q. And from your first employment until you became acting superintendent, what was the nature or character of your employment down there?

A. I was assistant superintendent.

Q. Then for about the last two years you have been the acting superintendent because of the absence most of the time of the superintendent, Mr. Parsons? A. Yes, the absence all of the time.

Q. You spoke in your direct examination, Mr. Heydenfelt, yesterday, that you knew of no way in which the situation could be made sure with reference to retaining dominion and control of the slimes; you remember that?

A. Yes, sir, something of that kind.

Q. And that the material that was used, to wit, the slimes themselves, in constructing the embankment was the best available material?

A. Yes, sir.

Q. Now, is it or is it not correct, Mr. Heydenfelt,

(Testimony of Frederick F. Heydenfelt.)

that the slimes were used simply because it was the most convenient material at hand? A. It is not.

Q. Was there any other material there that could be used with the exception of the slimes themselves?

A. We had no other material that was as suitable for that purpose as the slimes themselves?

[267] Q. Well, what other material did you have? A. We had no other material.

Q. The slimes themselves are composed of the crushed quartz, to a very large extent, are they not?

A. Yes, sir.

Q. And mixed with sand?

A. They are not mixed with sand; the slimes during a great deal of the process are separated from the sands in the process in the mill.

Q. Well, at any rate, the slimes themselves are the residue of quartz after it is treated by crushing, and through the different processes to extract therefrom the precious metals; is that correct?

A. It is the slime portion of the residue from the result of the treatment of the quartz ores.

Q. Now, have you ever had anything to do yourself, or under your direct observation, with the construction of impounding dams to restrain or retain slimes which have been treated by the cyanide process, or any other kindred process, except at this one particular place? A. Yes, sir.

Q. Now, what other place? A. At Goldfield.

Q. At Goldfield? A. Yes, sir.

Q. For what company there?

(Testimony of Frederick F. Heydenfelt.)

A. For the Goldfield Consolidated Mines Company.

Q. And when was that?

A. It was shortly before I came to Millers; and I had experience with the impoundment of sand tailings at the old Combination Mill of the Goldfield Consolidated Mining Company in Goldfield for over two years, in 1907 and 1908.

Q. Well, were any of those tailings or slimes those which contained cyanide? A. Yes, sir.

Q. There was an impounding dam constructed there, was there?

A. There was an impounding dam constructed at the Combination Mill for the purpose of impounding the sands that were sluiced from the [268] mill, the slimes were run out in the valley and down on the flat.

Q. The impounding dam constructed there was not for the purpose, and neither was it used for impounding any slimes that contained cyanide?

A. Impounding the sand tailings that contained cyanide.

Q. But the slimes themselves were allowed to escape?

A. The slimes themselves were allowed to escape.

Q. Now, was there any other place?

A. At the Goldfield Consolidated.

Q. That was at Goldfield also?

A. That was at Goldfield also.

Q. What were the characteristics of that?

A. That was all a slime process; there were no

(Testimony of Frederick F. Heydenfelt.)

sands whatever and those tailings were impounded and dams built up for the purpose of keeping the ponds.

Q. Now, any other that you remember?

A. No other ponds that I recall.

Q. I will ask you if it is true, Mr. Heydenfelt, that both of those that you have mentioned there at Goldfield were upon comparatively level ground, and that they were not at any great elevation with reference to the surrounding country?

A. Before answering that question I would like to say that there are other slime-ponds that I know of being in Tonopah and the Millers district; I neglected to mention them.

Q. Well, you know of their existence?

A. I know of their existence; I have seen them and know the method of constructing.

Q. At Tonopah, did you say?

A. Yes, sir. In answer to your last question, I will state that both of the ponds in Goldfield, both the sand-tailings pond and the slime-tailings pond at the larger mill, the later one, are on a [269] side hill, where there is considerable grade; the tailings run out through the mill, then they are gravitated without any difficulty.

Q. In other words, they are not forced out?

A. They are pumped out or forced out mechanically in any way.

Q. Do you understand, or is it your recollection, Mr. Heydenfelt, that the surface of the area covered

(Testimony of Frederick F. Heydenfelt.)

with slimes of the Desert Mill Company, and to which I point at the present time (pointing on map, Defendant's Exhibit No. 1), is at least ten feet higher than the point at a point about eight hundred feet, and being at approximately the point where the sheep were killed, which are involved in this suit?

A. That is my understanding from the figures upon the map.

Q. In other words, that there is that much fall in that distance? A. I believe there is.

Q. Now, at any of these ponds which you have mentioned at either of these other places, is there such a declivity or such a fall from the surface of those ponds, to a point in the general direction of the fall therefrom, at a distance of approximately eight hundred or eight hundred and fifty feet?

A. Yes, sir.

Q. Where is it?

A. At the Goldfield Consolidated tailings pond.

Q. Are either of these others which you have testified to as large in area, or with as great exterior surface pressure as this one? A. Yes, sir.

Q. What one? A. Goldfield Consolidated.

Q. Have you even known in your experience at Millers, or at either of these other places, where any other material was tried to be used by anyone, except the slimes themselves?

A. I have never seen any, but I have read descriptions in various mining magazines and books of the

(Testimony of Frederick F. Heydenfelt.)

method of impounding tailings at [270] various other plants.

Q. I ask if you had known of any?

A. I have known of them by that means.

Q. That is, through reading and through research?

A. Yes, sir.

Q. Personally, or as far as observation is concerned, have you known of any? A. No, sir.

Q. The slimes themselves when moistened or saturated, constitute the mud, do they not, what might be termed a substance of about the consistency of sandy mud?

A. They have a pasty consistency, yes, plastic.

Q. And upon drying they have a crumbling tendency, haven't they, to disintegrate? A. No, sir.

Q. They do not? A. No.

Q. Do they have a tendency to crack?

A. They have a tendency to crack—a shrinkage.

Q. Isn't there a clay, a natural ground material in that immediate vicinity there at Millers?

A. Not that I know of.

Q. You don't know of any? A. No, sir.

Q. What is the natural formation there before any treated ores, or the residual thereof, are deposited?

A. Well, it is mostly sand—sand surface; I believe under the surface at various depths there is a formation called a hardpan.

The COURT.—(Q.) Does the sand reach to the hardpan? A. Yes, sir.

Mr. SUMMERFIELD.—(Q.) Isn't it correct, Mr.

(Testimony of Frederick F. Heydenfelt.)

Heydenfelt, to your personal knowledge, that the flat between the lower dam and the point on that wagon-road where the sheep were killed, that the original formation is an adobe, compact adobe formation?

A. Well, I don't know whether you would call it an adobe or not; [271] it is a fine material very similar to the slimes in its composition and its physical characteristics.

Q. At any rate, to your personal knowledge, no other material has ever been attempted to be used, except the slimes themselves?

A. Yes, sir; we have used sand at different times on the back side of the dam, the side nearer the mill, or the south side.

Q. Has there ever been any attempt to put any core in any of the dams of any material?

A. Any what?

Q. Core?

A. Something you mean for reinforcement?

Q. Yes.

A. No, we have used timber sometimes to a break—span the break.

Q. That would be for temporary purposes, would it not, until the break, or the bank could be replaced?

A. It is permanently left in where it is placed.

Q. Did you have knowledge, or do you know whether the operating or managing officers of that company had the knowledge, that there was a continual extension of the slime area from the outer

(Testimony of Frederick F. Heydenfelt.)

dam to the north and northeast, following the general declivity of that particular section of the country? A. Will you repeat the question, please?

(The reporter reads the question.)

Q. In other words, that the area was extending gradually?

Q. The operating officers knew that there were occasional breaks occurred in the dam, and that as a result of those breaks some material was carried beyond the banks; but I don't quite understand what you mean by "continual"; it was an intermittent breakage.

Q. Well, as the breaks would occur, or would recur at different times, wasn't it well known there that at each one of those times the slime was being continually carried farther?

A. They simply knew when these breaks occurred these slimes were carried out to the north.

[272] Q. They knew that that was the natural result of the force of gravity, did they not?

A. Yes, sir.

Q. And along about the middle of February, as the result of investigations made in obtaining data for the preparation of the map which is upon the board at the present time, and introduced in evidence as Defendant's Exhibit Number 1, it was ascertained that the slime area at one point had encroached almost to the wagon-road running north from Millers, is not that true? A. Yes, sir.

Q. And was it or was it not perceptible to the observation of the managing officers of that company,

(Testimony of Frederick F. Heydenfelt.)

without that survey, that it was approaching and approximating that thoroughfare?

A. Well, I was familiar with the fact that there were dry slimes of area extending out to about the point indicated on the map—had been subject to overflow at some time or other.

Q. You say indicated by the map, you mean the area, I presume that was indicated by the brown colors of varying shades? A. Yes, sir.

Q. Is it or is it not correct, Mr. Heydenfelt, that the object and the purpose of the defendant company in constructing these dams was to retain the slimes for the purpose of extracting and recovering therefrom in the economies of the company, what valuable chemicals could be recovered?

A. Not for the recovery of the chemicals, it was for the purpose of confining our residues to an area, as small an area as possible, for the purpose of having them in confined form for handling in case it proved possible to retreat them at any time for the purpose of recovery of metallic contents or precious metals.

Q. Then the object, if I understand you correctly, was for the recovery by the company, in what it considered an economical management of its plant, such chemicals as could be recovered?

A. Well, we are not talking about chemicals; when you talk of recovery [273] from residues, chemicals are not metals.

Q. I know, but they are resultants from those

(Testimony of Frederick F. Heydenfelt.)

metals, are they not, in recoverable form? I will reframe the question, Mr. Heydenfelt, in order to make myself plainer. I wish you would state, if you know, whether the object of the company and its purpose in the construction and in the maintenance of these impounding dams, was for its own profit in retaining such materials as it might treat, or was it to prevent them from scattering over uninclosed country where injury might result to others? Now, which was the purpose and the object of their construction and their maintenance?

A. Why, the object was for confining them to an area so that they might be in a form convenient for handling in case of retreatment, as well as the prevention of their scattering over the open uninclosed country. What you might mean by "protection of others" I don't quite understand; people in and about the community there know what the cyanide is, and there is no need of protecting them against residues being discharged out onto the desert.

Q. Well, if the object and purposes in the construction and the maintenance both, was simply to confine the area, was there any other object in view besides the retention for the benefit of the company itself?

A. One other object is to confine them so that they are retained on our own property, for the reason that we would lose title to them if they went onto the property of others, or property other than our own.

(Testimony of Frederick F. Heydenfelt.)

Q. Now, that was for the benefit of the company then, wasn't it? A. Yes.

Q. Now, is there any object or purpose that you know in that connection, that had in view anything except the benefit of the company itself?

A. There was no other object that suggested itself to me.

[274] Q. Do you yourself know of any action, any deliberation by the operating officers of that company in which you participated, or of which you have personal knowledge, looking to the object of preventing any poisonous chemicals or cyanide reaching points where they might injure others, or the property of others?

A. Why, the proposition was never brought up in that way for discussion; it was never considered, the slimes as they were being handled on our own property being discharged into the locality where they are now found were being handled in a way that was not causing anybody any inconvenience, nor putting any danger in the way of anybody in or about the vicinity of Millers; and for that reason it was never discussed, and there was no occasion to discuss it in that way.

Q. Was there any discussion, deliberation, or action taken by any of the operating or managing officers, those in authority with that company, with reference to preventing them from running upon that thoroughfare, or along its borders?

A. Why, the means we were using to confine it to

(Testimony of Frederick F. Heydenfelt.)

the area that it is confined to, would be an effort to keep it from reaching any other point then the point in question; we used all the means we could to confine it, whatever the purpose might have been.

Q. It was well known, was it not, to yourself, Mr. Heydenfelt, and could be easily observed by any others of the company's officers, that for a long period of time these tailings and slimes had been extending beyond the outer dam, until they had practically reached the exterior borders of all of that area which is indicated in brown?

A. Well, had the slimes been confined to an area away from the road, the danger of the road would not have been eliminated.

Q. It would not have been?

[275] A. It is not a solid material; the slimes themselves are not poisonous materials; it is the solution, the liquid accompanying them.

Q. Well, they travel in comradeship; the liquids and the solution and the disintegrated solid material constituting a part of the solution, or a part of the material rather, travel by force of gravity together, do they not?

A. Yes, sir, to a certain extent; they might separate; the solution might travel to a point that the slimes did not; might set out several reasons and explanations.

Q. You are quite well aware of the fact, are you not, that the only two natural forces there, is either gravity or the action of winds; I say only two nat-

(Testimony of Frederick F. Heydenfelt.)

ural moving forces—well, I don't care about that, because it don't really affect it.

A. I might make an explanation to make that more clear to you; the slimes have a tendency to settle, to go to the bottom of the mass, and form a solid mass, and the solutions would stand on the top in a clear form; now, those solutions might move by gravity where the solid matter would not.

Q. Unless it was carried by liquid material.

A. Well, it is a liquid—solution is a liquid.

Q. Well, the solid material is not a liquid, is it? Isn't it true, Mr. Heydenfelt, that a comparatively low levee from the point about where the sheep were killed, and running parallel to that road, would have prevented, not only any of the slimes from passing upon the borders, but any liquids? A. No, sir.

Q. It is not true? A. No, sir.

Q. Why; if there had been one wouldn't it have had the same effect of either of these dams?

A. Rain water could reach the road, drain from the outer part of the dam or levee.

Q. You misunderstood me.

A. You said liquids.

[276] Q. I will then qualify that: Any liquids that could be impregnated with any poisonous materials escaping from the impoundments of the mill of the Desert Power and Mill Company?

A. No, sir, it would not prevent it.

Q. Why wouldn't it?

A. There is an action of concentration; the solutions that are discharged with the residues contain

(Testimony of Frederick F. Heydenfelt.)

the lime cyanide, gold and silver, and other contents in the form of solution, and as that solution is drawn through the solid material, it evaporates on the surface, and deposits its salts and other dissolved ingredients in the form of a crust, and if any rain, or water from any other source would fall upon those salts, they would redissolve and be carried by that water in whatever direction it might travel; and that depositing of salts occurs on the outside of the dam just as much as on the inside, and on the top.

Q. Well, that is by reason of a process of crustation, is it?

A. Crustation by evaporation of solutions.

Q. There is a levee at the present time running in the direction I have indicated, is there not?

A. Not down to the point mentioned.

Q. Well, how far down?

A. About down to the point opposite the corner of the dam marked number 2, I believe, about the corner marked number 2 (indicating on map).

Q. At the point marked 77.8. And it has not been extended farther?

A. It has been brought around and joined onto the corner at that point; it is a little furrow, you might call it, shovelled up there eight or ten or twelve inches high, and the material used is sand, which is found there.

Q. Do you know why that was not indicated upon the map, or was it there at the time?

A. I doubt whether it was complete, whether it is continuous for damming purposes.

(Testimony of Frederick F. Heydenfelt.)

[277] Q. You knew since you have been acting superintendent that the thoroughfare which is indicated on the map as running north from Millers, and at the point about where the sheep were killed, was in use by the general travelling public who had occasion to use it, did you not? A. I knew the—

Mr. BROWN.—One moment. I think it is not cross-examination.

Mr. SUMMERFIELD.—The reason I believe it is competent, if the Court please, because there was testimony introduced in the direct examination of this witness that there were not any cattle or sheep, or anything of that kind, being driven through the country there.

The COURT.—Well, he testified to something of that kind, but I don't recollect anything about the road. I do not intend to prevent either side from introducing testimony of that sort before you finally close your testimony, but I do not believe this is proper cross-examination. If you want to put it in as evidence in chief—

Mr. SUMMERFIELD.—No, I don't care to do that.

Q. At and about the time the sheep were killed, you were aware that it was being used by such of the travelling public as desired to use it, were you not?

Mr. BROWN.—I object to that as not cross-examination. I don't remember that we asked this witness anything about the road.

(Testimony of Frederick F. Heydenfelt.)

Mr. SUMMERFIELD.—You asked the witness, though, about whether there were cattle and stock, or anything of that kind.

The COURT.—You can ask about sheep travelling there, or stock. I think that was as far as the question went; it did not impress me as of sufficient importance to make a note of it.

Mr. SUMMERFIELD.—Very well, I will pass the question.

Q. How frequently would these leaks occur in that dam, Mr. Heydenfelt?

A. We have no record of the number of breaks that occurred or the intervals between breaks; might be one or two in one day, [278] and there might not be another for a month or two months.

Q. Now, these men, if I understood you correctly, sometimes during the winter months you would keep two and maybe three men, and in the summer months only one; now were they employed there just simply to look after that dam? A. Yes, sir.

Q. And for nothing else?

A. Yes. We might in the summer-time, or in the winter even, if we had two or three men out there, call one of them into the mill for one or two days during the week, if we were short-handed in there on cleanup; but if they were needed on the dam we would generally put somebody else on; it depended on the requirements of the dam as to whether those men while they were on the pay-roll were working continuously on the slime-pond, or whether their work was varied.

(Testimony of Frederick F. Heydenfelt.)

Q. When they worked on the slime-pond did they do any other work except repair the dam?

A. Not the men I have in mind; we had other men on the slime-pond for the purpose of sweeping and recovering values, concentrates on the surface; but I didn't have those in mind when I mentioned the slime-pond.

Q. Were the sweepers the ones that would repair the dam when leaks occurred in it? A. No, sir.

Q. They did not perform both characters of work at all? A. No, sir.

Q. Has there ever been any effort made by the company to your knowledge, or as a result of your observation, to build any further outlying impounding dam than the one which I indicate at the present time with my pencil as being the crest of the outside dam indicated upon that map?

A. We are building one now.

Q. When was the construction commenced?

A. Started about two months ago.

Q. Two months ago? A. Yes.

[279] Q. Is that one for the purpose just simply of retaining the slimes? A. Yes, sir.

Q. How long ago was it, if you know, when the outer embankment, the outer completed embankment, was constructed?

A. The outer completed embankment?

Q. Yes.

A. Well, the embankment is not started and completed at any one time; it is built as we go along; we don't throw up a large high embankment, and then

(Testimony of Frederick F. Heydenfelt.)

start to fill it; we build it up in steps as we go along.

Q. You keep raising it as the interior surface is elevated by the slimes then; is that correct?

A. What is that?

Q. I say you raise the embankment as the slimes deposited on the inside keep being elevated by reason of their deposit? A. Yes, sir.

Q. That is the way you build it? A. Yes.

Q. Do you know when the outside embankment was commenced, when the construction was commenced?

A. Well, it was perhaps three years ago—three years and a half.

Q. Would you indicate on the map if you can, Mr. Heydenfelt, where this last embankment is that you speak of?

A. There is a natural raise in the ground that runs across about here, in this general direction (indicating on map); and another one that runs down along this direction, and the bank is being thrown across from one of those points to the other, and these slimes are being run out into this territory here, and an impounding embankment thrown out around here.

Q. To the north and to the northeast of that portion of the map shaded in brown, is that correct?

A. Yes, sir.

The COURT.—(Q.) Which side of the road is that?

A. On the west side. We are extending this embankment, is our [280] purpose, and throwing

(Testimony of Frederick F. Heydenfelt.)

this embankment across preparatory to it; and there is a natural basin in there, so that the dam construction such as we have here, is not necessary, and will not be necessary for some time to come.

The COURT.—Just move your pointer over the road, if you will.

A. There is one (indicating).

Q. And this embankment will prevent the slimes from running to the point where the sheep fell?

A. Well, it is carried from here down,—if this embankment should break, and the same thing could occur that has occurred here; I believe if another embankment were put outside of that, and another one outside of that, the same thing might occur.

Q. Well, the point where the sheep were killed is inside of this new line of embankment?

A. No, sir, it is outside.

Q. And when that is completed the natural flow of the water will not go down to that point then?

A. There is a fence in here on the wells that we are not approaching at all; the dam comes around in here (indicating on map).

Mr. SANDERS.—Permit me to ask one question. (Q.) Isn't it a fact that this proposed embankment that you have commenced, a few months ago, takes this direction right straight out down here, and this direction, which would prevent, if any slimes came up there, or got in there,—it would stop their flow into the public road?

A. I pointed to the direction, Judge Sanders, that the dam ran.

(Testimony of Frederick F. Heydenfelt.)

Q. Just answer the question yes or no.

A. No, it is not.

Q. It is not the fact? A. No, sir.

Q. That there has any embankment been started there to prevent these slimes from flowing into the public road since the injury to the sheep?

[281] A. There is preparations for a new dam, an extension of the dam for the impoundment of the tailings.

Q. But not for the purpose, as you say, to prevent it from flowing into the public road?

A. There is nothing flowing into the public road through here.

Q. But there is right here where it did flow?

A. There was here.

Q. Now, haven't you thrown embankments up to prevent these slimes from taking the course which they did when the sheep were killed?

A. No, sir.

Q. Well, what have you done?

A. They don't embrace enough of the old bank to prevent such a thing as that; they are merely an extension of this bank,—of the eastern part of the dam.

Q. Now, haven't you got an embankment, as I stated before, running about in this direction (indicating on map)? A. No, sir.

Q. Where is the embankment on that?

A. The embankment runs in this direction.

Q. In this direction, leaving that much of the overflow on the outside of the dam?

A. Yes, and this part of the dam exposed, to allow

(Testimony of Frederick F. Heydenfelt.)

its breakage to run down there, if it should happen to break.

By Mr. SUMMERFIELD.—(Q.) The effect would be to enlarge the area to the west, and to restrict an extension towards the east and northeast, that would be the effect of it, would it not?

A. The effect of extensions would restrict it beyond a certain point, north, east and west.

Q. That general course is substantially parallel with the course of that road, isn't it, with a slight divergence to the northwest?

A. No, the extension is running about directly north; the road mentioned is running northwest.

[282] Mr. SANDERS.—(Q.) As a matter of fact, that whole territory has been fenced since that time, hasn't it, and gates put across this road?

Mr. BROWN.—Objected to on the ground, specifically that—

The COURT.—I will sustain the objection. That is something which has occurred since the transaction.

Mr. SUMMERFIELD.—(Q.) If I understood you correctly, Mr. Heydenfelt, you said that there was probably a mile of dams, one within each other, there? A. Yes, sir.

Q. Something like concentric, one after the other? Is it or is it not correct that these have been built from time to time in order to extend the surface area of the retained slimes? A. No, sir.

Q. What have they been kept for?

A. Not entirely. There have been two embank-

(Testimony of Frederick F. Heydenfelt.)

ments prior to the one being constructed now, for the purpose of extending; the other embankments are for the purpose of facilitating in the working of the dams proper, in the governing of the flows onto the surface of the dams.

Q. For the regulation?

A. For the regulation of the flow and discharge of the slimes onto the dams.

Q. Now, the construction of each and all of these dams has been for the purpose and object, has it not, of retaining the slimes in the interest of economy by the defendant company?

A. Well, I would state that the purpose was to keep them on the area of our own properties, and for the purpose of having them in a convenient form for handling for the purpose of retreatment.

Q. By the regulation of the flow, isn't it correct that it was for the ultimate objects you have mentioned?

A. Yes, the regulation of the flow is for the purpose of accomplishing [283] by this impoundment, the retaining of our slimes.

Q. That is what I had reference to. You say you talked with the herder and he seemed to understand you? A. Yes, sir.

Q. Where was that?

A. Over by the sheep camp.

Q. Who was present?

A. Why, I think a man by the name of Mr. Broiles helped me drive the sheep up; I don't know whether

(Testimony of Frederick F. Heydenfelt.)

he crossed the track with me now, or not, I don't recall.

Q. Well, was the conversation quite brief, or was it extended? A. Yes.

Q. Quite brief? A. Yes.

Q. It is more of an impression, is it not, upon your part that he understood you, rather than the conversation?

A. His answer to my question would indicate that he understood what I said to him; it was an intelligent answer, well expressed.

Q. And that was about the extent of the conversation, wasn't it? A. Yes, sir.

Q. The question you mentioned? A. Yes, sir.

Q. Now, that conversation that you had with Mr. Holcomb, I believe you said that it was your best recollection it was with Mr. Holcomb, but that it might have been with Mr. Wheeler; that was your testimony, was it? A. I believe it was.

Q. And that was in the office, I think you said?

A. Yes, sir.

Q. In the company's office? A. Yes, sir.

Q. Was Mr. Wheeler present?

A. They were both present when this conversation took place.

Q. The extent of this conversation was that you asked him why his man ever let the sheep go down there when he could have taken them down around south? A. I don't know as I said that.

Q. What is your recollection of what you said?

[284] A. My recollection of what I said is, I

(Testimony of Frederick F. Heydenfelt.)

asked them why in the world they thought a man would drive them down in there, and could go some other way, and knew there was a danger there, and had been warned against it; and I think we even discussed further that there was a scarcity of water in there anyway.

Q. That was the next day after the sheep were killed?

A. I believe it was; there was a general discussion as to the actions of a man, it was something almost unbelievable, and we were discussing it generally.

Q. Your recollection about the only answer he made was that he supposed he would follow the snow, or the snow line?

A. He said that a man would usually follow the snow line, and depend on snow, being in a country of that character.

Q. Was there any snow in the vicinity of Millers about the 5th of February, or at any point of time approximate thereto?

A. There was snow on the foothills at that time.

Q. That was a good many miles away, wasn't it, Mr. Heydenfelt?

A. No, Mr. Wheeler and Mr. Holcomb indicated foothills, snow on the foothills, was his remark.

Q. You say there was snow on the foothills at that time? A. Yes.

Q. I ask you if that was not a good many miles away? A. Probably three or four miles.

Mr. SUMMERFIELD.—I think that is all.

(Testimony of Frederick F. Heydenfelt.)

Redirect Examination.

Mr. BROWN.—(Q.) Mr. Heydenfelt, will you indicate on the map with pencil, the position of the new dam construction?

A. I think it would come from approximately in here, this is high ground (indicating line on map).

[285] Q. Now, indicate the course of the high ground with black pencil crosses. (Witness indicates as directed.)

Q. You have made some black pencil crosses on the east side of the road, are you counting on that for dam purposes?

A. If we have to extend out that far; if our operations will produce sufficient slimes to carry us out to that point, we will have to use it.

Q. That will be a matter of future operation?

A. Yes.

Q. But for the immediate present, you have constructed, and are constructing a dam indicated by the solid black line, and the solid black line runs into the line of black pencil crosses; the solid black line and the black crosses running southwest, indicate the general course of the dam that you propose to use?

A. Yes, sir. When this depression in here is filled, that will be carried up so that it will have a tendency to spread out in this direction; we will start the dam up here, and as it fills up to the top of this high raise, we will start the dam, and it will ultimately assume a dam of that shape.

Q. Then you contemplate that probably ultimately you may have to go across the road to the northeast

(Testimony of Frederick F. Heydenfelt.)

for dam purposes? A. Yes, sir.

Q. And the new dam you have indicated, that will be liable to the same physical conditions and the same breaking incidents that the other dams have been liable to? A. Yes, sir.

Q. If you constructed a furrow along the west side of the road, or if you constructed a furrow along the side of the road in the immediate vicinity of where the sheep had been killed, the furrow presently would fill up, would it not? A. Yes.

Q. And such a furrow would serve the purpose of a confining ditch filled with cyanide solution, would it not? A. Yes, sir.

[286] Q. If you built a dam in the immediate vicinity where the sheep were killed, and constructed a dam on the west side of the road, if it were a low levee, as suggested by counsel, the incrustation of the salts there, would be washed off the bank onto the road, would they not?

A. Yes, sir.

Q. And if you built a low levee, or any kind of a levee, or dam along the west side of the road for any distance whatever, that dam sooner or later would have the same characteristics of all the other dams, would it not? A. Yes, sir.

Q. For the purpose of collecting and impounding cyanide solutions, where would they be most isolated from the road, by your present methods, or by furrows and levees in the immediate vicinity of the road, so far as travel on the road is concerned?

A. By our present methods.

(Testimony of Frederick F. Heydenfelt.)

Q. They are most isolated from the road by your present methods? A. Yes.

Q. All other methods suggested by counsel would simply serve the purpose of bringing and congregating cyanide solutions nearer to the road?

A. Yes, sir.

Q. From what point did you take the photographic exhibits put in evidence yesterday?

A. From the point indicated by "A" on the map, about.

Q. Indicated in lead pencil? A. Yes.

Q. You took both the photographic impressions from that point?

A. Yes, sir, one was taken up a little closer to the road than the other one, but "A" would indicate the position from which they were taken.

Mr. SUMMERFIELD.—(Q.) They were both taken from the same point?

A. No, sir, the camera was moved between the two pictures.

Mr. BROWN.—(Q.) Mr. Heydenfelt, is there any answer you gave on [287] your cross-examination that you desire to explain to the Court, and give the Court any information about?

A. There might be something regarding the question of a continual overflow; the amount of material outside of this dam was very small at the time of February 4th or 5th, or up until the time we started making this dam; the amount of material in this section shown by the darker brown was very small compared with the material retained in these dams,

(Testimony of Frederick F. Heydenfelt.)

in the way of quantity—tonnage; while it shows a great area probably as large or larger than here, it would indicate that these dams were on—

Mr. SANDERS.—(Intg.) I object to that as being argumentative. It has already been testified to that the depth of that overflow area is eighteen inches, with a gradual spreading out, clear out to the outer edges; now for Mr. Heydenfelt to argue that was much smaller in depth or quantity than that contained in the dam, is argumentative, and does not tend to explain anything that he has testified to already.

Mr. BROWN.—I don't think it is argumentative; it is simply a statement of fact.

The COURT.—It is an explanation of a statement of fact already in testimony. If this witness sees fit to inject any argument into it, I shall not consider it.

WITNESS.—It is for your information, your Honor, that the material shown here was flat; there are no relative heights mentioned or marked on the map, and I wanted to—

The COURT.—I thought the heights were put on the map.

A. They are relative heights outside of the dam; but the dam itself, the banks, and thickness of the material contained within those dam boundaries or embankment, is not shown or indicated on the map.

[288] The COURT.—Well, the testimony is from eight to ten feet in the outer dam, and from twenty

(Testimony of Frederick F. Heydenfelt.)

to thirty feet, as I understand it, in the inner dam; and my recollection of the testimony is that the material on the outside shaded from three feet to nothing.

Mr. BROWN.—(Q.) Is three feet a correct statement?

A. I think three feet would be too much; it would depend on where it was taken; the dam itself would taper down from the top in this direction, the rains would naturally wash it, and right at the foot the material might be from two to three feet deep; it would not be a part of the dam proper, and would not represent the overflow or the material that had escaped from the interior of the dam.

Q. What would you say as to the maximum thickness of the overflow?

A. I should think for a distance of three or four feet beyond the dam here, which would include the base of the dam, that one foot would be ample to cover the deepest part.

Mr. BROWN.—That is all.

Recross-examination.

Mr. SUMMERFIELD.—(Q.) Mr. Heydenfelt, have any measurements or excavations been made, or have you seen any made, or did you make any yourself, for the purpose of informing yourself?

A. I recall that from the fact I noted the depth of the slime around here in removing some old posts that were standing around the dam.

Q. That was right within the edge of the outside

(Testimony of Frederick F. Heydenfelt.)

base of the dam, was it not? A. Right what?

Q. Right at the edge of the outside of the base of the dam?

A. Just a little beyond the base of the dam, what you might call the base, yes.

Mr. SUMMERFIELD.—That is all.

[289] By Mr. SANDERS.—(Q.) Mr. Heydenfelt, taking into consideration the conditions and circumstances that brought about the enlargement of the area there for damming purposes, did you take into consideration at all the rights of the public?

A. In making this extension on the dam?

Q. The question is, taking into consideration the conditions and circumstances which brought about, in your judgment, the necessity for the enlargement of the area for damming purposes, did you, or your company or its officials, take into consideration the rights of the public in connection therewith?

A. There was nothing considered in making this extension except the most suitable place for it, and the fact that a larger amount of residue is being discharged onto the dump, and the height it was attaining requiring extension of the dam.

Q. Have you at any time before February 5th ever taken into consideration in the collection of those tailings and the impounding of them, the rights of the public in connection with their outlet and inlet into the town of Millers by the dammed area?

A. We never considered that matter at all; it was on our own property.

Q. It was on your own property, and your com-

(Testimony of Frederick F. Heydenfelt.)

pany proceeded upon the theory it had a right to do as it pleased with it.

A. We had a right to deposit it on our own property.

Q. Wasn't that matter discussed by your people and you with the officers of the company?

A. I do not recall it ever was the subject of any discussion regarding that matter.

Mr. SANDERS.—That is all.

By Mr. BROWN.—(Q.) If, Mr. Heydenfelt, in all these matters of dam construction and dam maintenance, your motive had been the [290] protection of the public instead of the preservation of commercial values, what could you have done in addition to what you have already done that would further protect the public interest?

A. I know of nothing, Mr. Brown. Our purpose was to bring those slimes in there and hold them there, and we used every means possible to hold them, and I don't know of anything else that could have caused us to be more careful, or I doubt if any other means would have been more effective in retaining them.

Q. If your motive had been to preserve human life or animal life, instead of to save money, could you have done any more than you have done?

A. I don't know of any other construction that could have been used.

Mr. BROWN.—That is all. If Court and counsel please, I have here the patent from the United States Government, but it is incumbering the record, and

(Testimony of Frederick F. Heydenfelt.)

would save time if counsel would admit the title.

Mr. SUMMERFIELD.—What are the dates of patent?

Mr. BROWN.—There are two series of patents. One portion of the ground was patented in 1904 and the other portion in 1907. The first series are all dated 1904, and the other series are dated in 1907.

Mr. SUMMERFIELD.—I don't know what land is patented.

Mr. BROWN.—They cover everything which is shown on the map—everything which is shown on this smaller portion of the map; that inclosed within the red lines above the hatched portion, and the vacant portion. These are all original documents, and I should be disinclined to leave them permanently.

Mr. SUMMERFIELD.—I have no reason for denying it if counsel gives me the assurance that the patents issued at the dates he has [291] named covering the portion inclosed in red lines on the reduced map, or Plaintiff's Exhibit Number 1. I understand that is the effect of it.

Mr. BROWN.—I give counsel that assurance. They are all under the seal of the United States Government, and I give counsel the assurance that we have the patents there for that entire area.

Mr. SUMMERFIELD.—At the dates mentioned; one series in 1904 and one series in 1907?

Mr. BROWN.—Patented by myself.

Mr. SUMMERFIELD.—I am satisfied with counsel's assurance.

Mr. BROWN.—The patent title, then, may be admitted.

Testimony closed.

**[Certificate of Reporter to Transcript of Testimony
and Proceedings.]**

[292] I, A. F. Torreyson, do hereby certify that I reported the case of Sierra Land and Livestock Company, a Corporation, Plaintiff, vs. Desert Power and Mill Company, a Corporation, Defendant, tried in the District Court of the United States, in and for the District of Nevada, commencing November 16th, 1914, and ending November 19th, 1914, and that the foregoing transcript, consisting of pages 1 to 291, both inclusive, is a full, true and correct transcription of my shorthand notes of the testimony given and proceedings had on the trial of said case.

Dated May 17th, 1915.

A. F. TORREYSON.

[Endorsed]: No. 2619. United States Circuit Court of Appeals for the Ninth Circuit. Sierra Land and Livestock Company, a Corporation, Plaintiff in Error, vs. Desert Power and Mill Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed June 30, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2619

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Sierra Land and Livestock Company

(a corporation)

Plaintiff in Error

vs.

Desert Power and Mill Company

(a corporation)

Defendant in Error

BRIEF FOR DEFENDANT IN ERROR

HUGH H. BROWN,

J. H. EVANS,

Counsel and Attorneys for

Defendant in Error

Filed this-----*day of*-----, 1915.

FRANK D. MONCKTON, Clerk

By-----*Deputy Clerk.*

and began operations in 1906. It has operated continuously to date. The mills called the town into existence. There was nothing but a railroad water tank at the townsite in 1905 at the time of commencing the construction of the mill. (Tr. p. 358; 369.)

The track of the Tonopah & Goldfield Railroad Company runs through the town, easterly and westerly. The residence portion of the town lies along the south side of the track. The two milling plants lie on the north side of the track. The plants and their appurtenant property lie side by side, and extend about a linear mile along the north side of the track.

The tailings dams, or impounds, are situate on the north side of the respective plants, and in immediate juxtaposition to the plants. The defendant's dam (which in reality is a series of dams,—one outside of, and surrounding, the other) is an aggregate one mile in length and an aggregate 1500 feet in width. (Tr. p. 415; 359-60; 382).

The town is situated in an open sagebrush valley, many miles wide. (Tr. p. 121-2). The country is almost flat (Tr. p. 88), except for a low hill about half a mile south of the town. The land slopes gently toward the north; the slope from the dam is away from the direction of the town. (Tr. 393). Plaintiff's brief is in error in stating that the land slopes from the dams toward the town. (Plaintiff's Brief, p. 2).

The Postoffice is close to the railroad track, on the north side, and a stone's throw from the east boundary line of the defendant's mill.

There is a road between the Postoffice and the

mill,—the road in question in this case. The road was made in 1906 by the builders of the mill. (Tr. 327-8). It runs northerly, past the mill and the tailings dam, and several hundred feet distant therefrom.

The defendant's pump-man, LosKamp, resided near the road, at a point about eighteen hundred feet northerly from the Postoffice. (Tr. p. 101).

A pool of water accumulated in the road,—and extended a short distance each side of the road,—at a point very close to LosKamp's house. The water was two to four inches deep. (Tr. p. 152). The water was principally in the ruts in the road. The pool was an accumulation of rain water. On the eve of the accident it had become impregnated with leakage and seepage from the tailings dam.

This was the only pool of water in that immediate locality. (Tr. p. 151; 158; 287). All references to water, and all conversations and warnings regarding water in or around Millers, on the north side of the railroad track, had reference to this specific pool.

The witness Fickes and his wife resided about half a mile east of the pool.

The locus of the foregoing points and objects is shown with particularity on the maps and photographic exhibits of the defendant.

McGarry and his herder, Lamont, arrived in Millers with a band of about sixteen hundred sheep at midday on February fourth, 1914. McGarry, driving a camp wagon, came into town about an hour in advance of the sheep. They pitched camp on the edge of the town, on the

south side of the railroad track, about a half mile, more or less, south of the Postoffice. Thereafter, during the remainder of that day, the sheep were grazed and herded in the vicinity of the camp.

On the following day, February fifth,—the day of the accident,—Lamont began to move the sheep at 7 o'clock in the morning. During the next five hours they grazed leisurely through the sagebrush, describing a crescent-shaped course, from the camp, thence northerly across the railroad track, toward the Fickes residence, and thence westerly toward the pool in the road, arriving at the water at noon. (Tr. 102; 104; 138-9; 141-27). Here ten hundred and ninety of the sheep were killed by the cyanide in the water. The sheep were driven into the water by Lamont, pursuant to McGarry's order. (Tr. pp. 138; 140). The course of the sheep on February fifth, is delineated on defendant's map exhibit. The sheep tracks, in the sagebrush, enabled the surveyor to plat the course. (Tr. p. 369; 355). The course was one-half to three-quarters of a mile in radius from the Postoffice. (Tr. pp. 138-9; 141-2).

From the foregoing, it is manifest that plaintiff's brief is in error in stating that the sheep were driven *along* the road to the water. (Plaintiff's Brief, p. 2). The sheep were not on the road at any time on February fifth, except when they came into the pool of water at noon on that day. (Tr. 102; 104; 138-9; 141-2).

McGarry was repeatedly warned against the danger of cyanide in the pool, as hereinafter appears.

ARGUMENT

The two points of primary importance raised by the Plaintiff in Error are:

(1) Whether the record shows contributory negligence by a preponderance of proof.

(2) Whether, under the facts of the case, the defense of contributory negligence is eliminated.

I.

PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE

McGarry was warned. He ignored the warning. He failed to pursue the course of conduct that would have been pursued by an ordinarily prudent person under the circumstances.

"The presence of the cyanide mill itself was a danger sign," said the district court. (Tr. 36). The same thing has been said of railroad tracks, by the Supreme Court, in the "railroad crossing cases."

The mill is visible for miles around. The tailings ponds are visible and conspicuous. Any person familiar with the mining country would know what they are. (Tr. p. 105).

McGarry, the sheep tender, the man who had sold the sheep to the plaintiff, and who at the time of the accident was agent for the plaintiff, was himself a mining man. He was one of the pioneer owners and operators in one of the mining districts in southern Nevada. (Tr. p. 154). He knew mining conditions; he knew cyanide,—as every mining man does. McGarry said: "I knew there were mills there in Millers, and *I was looking out for cyanide water* if there was any

there. If there was any cyanide water I wanted to find it." (Tr. p. 156).

If there was nothing else in this record except the foregoing, it would show by a preponderance of evidence that McGarry knew the conditions; that he was put upon his guard; and that as a prudent man it was incumbent upon him to make investigation. It devolved upon him to square his conduct with the "look and listen" rule, repeatedly affirmed by the Supreme Court. But so far from taking an actual look at the situation, McGarry never did more than to view the pool from the Postoffice or saloon, a distance of a third of a mile away.

The record shows that McGarry not only was put upon notice by the physical conditions patent to his eye, and intelligible to his judgment as a mining man, but he was further put upon guard by the express and specific warnings of four witnesses, given by word of mouth.

(a) *Fickes' Warning:*

McGarry said, "The minute I drove in (to Millers) this man (Fickes) came up there to the camp and said there was cyanide water, *to be careful*—the man that wanted to buy the mutton; and I knew there was mills there in Millers, and I was looking out for cyanide water if there was any there."

"Q. You were looking out for cyanide water?

A. I didn't want to run into it if there was any there.

"Q. And he told you to look out for cyanide water? A. Yes.

“Q. Now, when the man who came to buy mutton told you to look out for cyanide water in that country, what water did he have reference to?

“A. Down at the mills, I suppose,—*pointed to it.*”

(Tr. p. 156).

It won't do to say that Fickes was warning him to look out for cyanide *within* the dams. It would be practically impossible for sheep to get into the *impounded* cyanide. The dams generally were ten feet high; and in some places thirty feet high. The sheep could not climb up the high embankments of the dams. At least McGarry said that the sheep could not get into the dams “unless they were run right in there.” (Tr. p. 159).

Manifestly, Fickes was warning him against the water that had escaped from the dams. Fickes said “There was a chance for them to escape (meaning the slimes); there was a lot of slimes running down; that is why I spoke to these gentlemen and said ‘I am not positive; they might be,’ ” (meaning that the escaped slimes might have got into the pool in the road). (Tr. p. 323).

The specific warning of Fickes, admitted by McGarry, could have reference to no other water than the one pool here in question. There was no other pool in that locality. “There was no water in there close at all except that one pond.” (Tr. p. 151). “That was the only water that we could find.” (Tr. p. 158). “To my knowledge there was only just this little slough in there, just this one little pond.” (Tr. p. 287).

There are references in the record to other water,—lots of it,—far out on the flat, in the country north of Millers, en route to Crow Springs. This latter water was beyond the mill vicinage.

(b) *Acree's Warning*:—

“Then he (McGarry) says to me, ‘What is that water down there, cyanide water or rain water?’ and I says ‘Well, I think it is rain water, it has rained in there, but *I wouldn't take a chance on it if I were you*; If you have sheep and want feed and water for them, go to the lake,’ and he says ‘what lake’; and I directed him to the lake three miles from Millers in a southwesterly direction, showed him how to get down there.” (Tr. p. 237). To same effect: Tr. p. 240.

(c) *Bohannon's Warning*:—

“McGarry asked if that was rain water down there or cyanide water; Acree laughed and says ‘Why I wouldn't take any chances on it being cyanide water, possibly could be.’ ‘No,’ I said to him myself, ‘I would not take any chances either.’ I think Acree spoke up then and told him about the lake, or the man inquired if there was any other way, I don't just recall that, but I believe that he did. Acree told him that there was a lake to the south or down to the south and to take the side of the town he was on at the time with the sheep; it was good water, he was sure it was.” (Tr. pp. 281).

Again, “Acree asked him if he had sheep, and advised him not to go there (meaning the pool in the road) on account of the water. McGarry asked him if it was rain water or cyanide water.” (Tr. p. 282).

(d) *Floathe's Warning*:—

"I asked him if those were his sheep, and he said yes; then I told him to be sure and keep them on that side of the track, on the south side of the track, and not to get them on the north side, because if he did they would be liable to get into cyanide, get into water there, and told him if they do, you are liable to lose them all."

"Q. What response did he make to that? A. I don't exactly remember what he said, but he led me to understand that he knew it was dangerous to bring them over there." (Tr. p. 297).

Floathe was a mining man. He knew the conditions. He was engaged in recovering values, upon a royalty basis, from the slime ponds of the Belmont Company.

A sign-board could not have been more specific, as a warning, than the words of Floathe. If a sign-board had said: "Keep all livestock on south side of track. Beware of cyanide on north side of track,"—it could not have been a more potent warning than the warning given by Floathe.

If there had been a sign-board right at the pool: "Warning to sheep men: This rain water may contain cyanide. Don't take a chance,"—it could not have been more specific than the warning given by Acree and Bohannon.

Plaintiff's Brief attempts to minimize the force and effect of Floathe's testimony by stating that Floathe had in mind the Belmont pond, and that his warning was inspired by a desire to keep the sheep away from Floathe's leasing operations in the Belmont pond or impound. We say that

Floathe's undisclosed motive,—whatever it may have been,—does not minimize or neutralize the force and effect of the specific words he used. The probative effect of Floathe's words is to be taken at their face value. When Floathe said, in substance, "Don't go on the north side of the railroad track for water," it is fair to affirm that McGarry understood Floathe to have reference to the specific pool in question, because McGarry and other witnesses say that there was no other available water on the north side of the track except that particular pool.

All the warnings above-mentioned were given on the afternoon of February fourth.

McNaughton's Testimony:

"I heard him (McGarry) say he would like to stay around for a week or so, but he was afraid of cyanide water." (Tr. p. 331).

In view of the warnings given by these four witnesses,—Fickes, Acree, Bohannon, Floathe,—any prudent man would have gone down to look at the situation instead of viewing it from the distant postoffice or saloon. If McGarry had exercised that slight measure of care, he would have seen, at a glance, what the Plaintiff's witness Moran described, namely a seepage channel, plainly visible, direct from the dam, in the direction of the pool in the road. The seepage channel was a foot wide and a foot deep, made by the seepage of many years. (Tr. 372). It was perfectly plain, to the eye, that the solutions were seeping directly from the dam toward the water in the pool. This condition would be apparent

to any mining man. (Tr. pp. 85-88; 90-92; 96-99).

The witness Wheeler, an officer of the plaintiff corporation, and one of its owners, said that he had gone down to look over the situation the day after the accident, and that he perceived the significance of the situation at a glance; that any person could see at a glance the actual situation. (Tr. pp. 230-232). It was not a concealed or latent danger.

On the morning of February fifth, McGarry told Lamont to take the sheep over on the north side of the track and give them the water in the pool.

It was an act of supreme folly,—for a mining man to water a herd of sheep in a pool of water on the seepage edge of a cyanide dam!

A perusal of the whole record warrants the suggestion that during the twenty-four hours McGarry was at Millers he was more interested in the attractions of the saloon near the Postoffice than in the welfare of his band of sheep.

The foregoing review of the record establishes contributory negligence by a clear preponderance of the proof.

We respectfully refer to the Opinion of the lower court, reviewing the evidence on this point. (Tr. p. 34, et seq., beginning with last paragraph).

Plaintiff was within the rule laid down by the Supreme Court, that dangerous agencies are themselves a warning, and that in the face of such warning, the greater the danger, the greater the caution required. The rule is well illustrated in *Chicago & Northwestern R. R. Co. vs Andrews*, 130 Federal, at page 73, where VanDevanter, J., said that if a man is in doubt, it becomes his duty to exercise a greater measure of caution and vigilance for his own safety than would have been required otherwise. That case was a railroad crossing case, where the fog or smoke obscured the track and plaintiff was not sure that a train was coming. The court held that under these conditions an additional burden of caution was cast upon him.

In the case at Bar, if there had been no other testimony than Acree's declaration that the water "might contain cyanide," that would have been sufficient to raise a doubt in McGarry's mind and cast upon him an additional measure of caution and prudence.

There was still another warning in this case. On the morning of the fifth when the herder Lamont was herding and grazing the sheep, and moving toward the water, he passed the residence of Fickes, which was in that locality, and Fickes called to him and said: "There may be cyanide water down at that dam." (Tr. p. 308). The sheep and herder were then half a mile from the water. The herder had a dog, and there was a clear chance to escape the danger. The question is whether Lamont understood it. Lamont is a Frenchman, and at the trial an interpreter was

used to facilitate the proceedings. But plaintiff's counsel admit in the record that Lamont understood English, and understood it well. (Tr. p. 184). He understood English and used good English. When he reached the water and the pump-man, LosKamp, came out and cried, "Get your sheep out of here," the Frenchman said: "Isn't that good water?" (Tr. pp. 337-8).

Lamont was a miner. (Tr. p. 171). Every miner knows cyanide. We submit that Lamont understood Fickes and that Lamont saw fit to ignore the warning, as McGarry had done.

There is this further element in the case: As soon as Acree learned that McGarry had sheep he said: "Go around another way, keep south of the railroad track, and go to the lake three miles beyond. The water there is good. The feed is good. Go that way." (Tr. pp. 237, 239, 256). Bohannon advised him the same way. He said: "The reason we brought up the lake was we knew that the water and feed at the lake was outside of the water in question here. There could be no cyanide in the lake water." (Tr. p. 290). Taking the course by the lake would only have added four or five miles to McGarry's course.

This phase of the record presents this legal situation: As between a course which he had been warned against, and a course which was sure and safe, McGarry took the dangerous course. The courts generally have condemned in no uncertain terms the conduct of a man in that situation. There was no emergency compelling him to take the course that he did take,—

nothing but his desire to take the shorter course.

Plaintiff's brief has laid some stress on the statement of LosKamp that "It rained in here," when Lamont asked him if the water was good. When LosKamp heard the sheep in the water, he came out of his house in a stampede and said, "Get your sheep out of here," and he immediately began to drive them off,—those not yet in the water. It was then that Lamont said, "Isn't that good water?" LosKamp replied, "It rained in here," but he added "Get them out of here." The sheep already being in the water before LosKamp appeared, LosKamp's declaration could not affect the case, even if his declaration were susceptible of the meaning plaintiff seeks to impose upon it. It was too late to save the sheep. The damage already had been done. Lamont himself admits that if LosKamp had said it was poisoned water, in answer to Lamont's question, it was too late to avoid the damage. (Tr. 189; 185; 188; 243; 337; 338).

The net result of LosKamp's conduct was to save six hundred of the band of sheep.

Counsel says that McGarry had a right to rely upon the presumption that we were not violating the law; that he had a right to presume that the water was wholesome. We say that the presumption cannot be relied upon in the face of a warning and admonition. Furthermore, McGarry did not rely upon a presumption. He says: "The first thing I did on my arrival was to ask

if that was cyanide water." He said "I knew there were mills there, and I was looking for cyanide water." He said, "I camped on the south side because I wanted to find out about the water and because I wanted to find out about the feed. Of course, I was looking for cyanide."

The rule laid down in 3 Elliot on Railroads, 1749, is to the effect that while one may presume that another will perform his duty, still it never goes to the extent of dispensing with ordinary care on his own part.

Counsel has referred to the Nevada case of *Solen v. V. & T. R. R.*, 13 Nev. 106. But that case lays down this principle that we are relying upon:

"But the right to assume that the railroad company would properly perform its duty does not shield the plaintiff from the exercise of ordinary care and prudence on his part. The fact that the locomotive and tender of defendant was being carelessly and negligently moved backwards, without any signal being given of its approach, does not, of itself, authorize plaintiff to recover damages. If plaintiff, notwithstanding the negligence of the railroad company, recklessly exposed himself to danger, and it appears that the injury complained of would not have occurred but for his own misconduct or negligence, he cannot recover damages, but must bear the consequences of his own folly."

So much for the rule in Nevada; and the general rule is the same. Other cases cited in Plaintiff's brief go to the same effect. And more particularly the case of *Wabash, St. L. & P. R. R. Co.*

v. *Central Trust Company*, 23 Fed. 738, where the court said:

“It would not be correct to say on this subject that citizens have an unqualified right to act upon the presumption that railroad trains and other dangerous agencies will always be operated with the care and vigilance required by law or custom. Experience too often proves the contrary; and ordinarily prudent men will not, and without negligence do not, go upon railroad and highway crossings, or into like dangerous situations, without precautions against negligence on the part of those in charge of the dangerous agencies.”

Counsel's brief relies upon the rule laid down in *Beach*. That rule is stated as follows:

“When the defendant, by his own negligent or wrongful acts or omissions, constituting a breach of legal duty, throws the plaintiff off his guard, or when the plaintiff acts in a given instance upon a reasonable supposition of safety, induced by the defendant, when there is, in reality, danger, to which the plaintiff is exposing himself, etc., the plaintiff may recover. *Beach on Cont. Neg.*, Sec. 67.

This case is not within that rule, because McGarry was not “off his guard”; and there could have been no “reasonable supposition of safety” in the face of specific warnings given him by these witnesses.

Counsel stated that our answer admits the allegations in paragraph VII. of the complaint,—the allegations of defendant's negligence. Counsel has inadvertently dropped into error. The answer denies their paragraph VII. The answer

is as follows: "VII. Denies paragraph VII." (Tr. p. 11).

II.

THE DEFENSE OF CONTRIBUTORY NEGLIGENCE NOT ELIMINATED

Plaintiff's brief says that the defense is eliminated (a) because the defendant's conduct is alleged to have been wanton; and (b) because defendant's conduct is alleged to have been in violation of a misdemeanor statute of the State of Nevada, to-wit, 2 Revised Laws of Nevada (1912), Section 6546.

(a) There was no wantonness in defendant's conduct.

The record shows that the defendant had used more than ordinary care to confine these tailings; that it employed the best methods known to the industry in that behalf; and that it was diligent at all times to keep the dams intact and to prevent leakage. There is no dispute or conflict as to the facts on this aspect of the case.

First, as to the construction of the dam: We used the slime materials themselves to build the dams. The slime comes from the mill in the form of mud; it is the residue of the ores; the ground, pulverized ores. When these slimes become dry they are very hard. (Tr. p. 373). They form excellent material for the purpose. (Tr. p. 353). There is no other material that is so effective. (Tr. pp. 375; 383). The inner dam was thirty to forty feet in height. The outer dam (which partially encircled the inner dam) was eight to ten feet high. (Tr. pp. 359-60). The inner dam is fifteen hundred feet long by a thou-

sand feet wide. The outer dam, which embraced a portion of the inner dam, had an aggregate dimension of two thousand feet long by fifteen hundred feet in width. (Tr. pp. 359-60; 382). The method we employed, and the materials we used, in constructing the dams, are the same as used throughout the industry,—wherever dams are constructed. (Hereafter it is noted that in many mining districts the tailings are not confined at all, but are allowed to run at large).

Dams of this character are everywhere subject to occasional leakage and seepage. It is unavoidable. It particularly occurs in winter time, under the operation of the natural forces of freezing and thawing. The material will crumble at points, and the solutions leak or seep through. (Tr. pp. 359; 382; 387). The witness Fickes says: "It is hard stuff to hold. They break. It happens to all slime ponds." (Tr. p. 323).

There is no known way to prevent the leaks. (Tr. p. 387). A break or leak is not discoverable until it occurs. (Tr. p. 387). Sometimes a leak occurs at the bottom of a dam twenty feet thick. (Tr. p. 389).

Late in January or early in February, immediately preceding the date of the accident, the nights were freezing and the days were warm. The leaks which occurred in the defendant's dam immediately preceding the accident, were caused by stress of weather. (Tr. p. 387). On the night of February 3rd, there was ice at McLean's station, not very far distant from Millers. (Tr. p. 163). The following day, to-wit, February 4th, was warm. (Tr. p. 181).

As to maintenance and repair of the dams: Defendant kept men daily at work watching the dams and repairing them when necessary. (Tr. pp. 354; 385; 300). In winter time we usually had two or three men working daily on the dams. If the weather was particularly severe, for instance, after heavy rains, the men would go out at night time with their lanterns to do the work. (Tr. p. 374).

The accumulated leakages, covering a period of eight years, had left a thin sheet or deposit of slimes around the outer boundary of the dams. While this deposit covers a considerable lateral area, the aggregate tonnage of the material thus escaping from the dams was insignificant. In bulk it graduated from a shallow depth of perhaps a foot, at points on the outer periphery of the dams, and thence tapered off. (Tr. pp. 372; 421-22).

The defendant's engineer stated that he tried to hold the tailings. (Tr. p. 364). The record shows that he was unusually diligent to accomplish his purpose.

Plaintiff's brief states that "These pools gave way." If it is intended by the brief to give the impression that there was any general breakdown of the dams, the brief is misleading. There never was any break except to the extent of small cracks and leaks, which could not be avoided, and which were superinduced by natural conditions, and which were guarded and repaired with diligence.

If there had been a better method of construction and maintenance known to the industry, for

impounding the slimes, and if there had been some known method of avoiding these leakages, plaintiff would have shown it; for their officers and witnesses and attorneys all were Nevada people, familiar with the mining industry and mining conditions. If there was a better method which we might have employed and did not employ, they would have shown it. Yet the most they did in that behalf was an attempt to show by cross-examination that an additional outer line of embankments, to-wit, another dam, might have avoided the situation. As a matter of fact we have such a series of dams there now. There are outer and interior dams, as shown by the testimony of plaintiff's witness, Moran. (Tr. 75; 366-7). The construction of an additional dam would simply be a repetition of the course heretofore pursued. There would be no special virtue in an additional outer dam. *Outer* dams leak as well as inner dams.

It was suggested that a low dam might have been built near the road, and thus have intercepted the seepage. As a matter of fact the District Court took that view. But this device is not warranted by the testimony. It would not be efficacious for the purpose. In fact, it would be an additional menace, because the salt encrustations which would accumulate on the sides of the dam, would wash off in rainy weather directly on to the road. (Tr. 407-8). Such a dam would merely serve the purpose of accumulating the solutions in the immediate vicinity of the road. (Tr. 420-21).

Two witnesses, Laizure and Heydenfeldt,

trained and experienced mining men, affirmatively declared that there was no better method for impounding and handling these tailings known to the industry. Heydenfeldt said that if we had been seeking to protect human life, there was nothing more that we could have done than we did do. (Tr. pp. 425; 353; 360; 384; 385).

The particular overflow which reached the road, never had happened before. It had never before encroached that far, and Heydenfeldt said that they had been careful to avoid that. (Tr. 364; 367). It was only a heavy condition of weather that superinduced that situation. It is to be remembered that in addition to the weather conditions above noted, there had been a recent heavy rainfall which had augmented the situation.

The Answer of the defendant, Paragraph XII. alleged: "That the common practice of cyanide mills during the same period has been to allow the tailings to run at large without any pond being constructed or maintained." The allegation was not controverted by any pleading of the plaintiff, nor was any evidence offered contrarywise. The evidence shows that the mills in the Tonopah Mining District, thirteen miles distant from Millers, allow their tailings to run at large for a distance of eleven miles across the desert. (Tr. p. 245).

In view of the foregoing considerations, we say there was no negligence, much less any wantonness, on the part of defendant, in the construction and maintenance of the dams.

Plaintiff's brief, says: "Defendant knew the water would kill any livestock traveling along the road."

No livestock had traveled that road, nor had any livestock been in that vicinity, since the mill was built. Stockmen had avoided that country, for eight years,—as any prudent stockman would do.

Nor have the stockmen of Nevada ever complained when the installation of some new mill had the effect of segregating a small tract from the grazing lands. Nevada is a vast, raw, undeveloped state. No industry ever has had reason to complain of lack of elbowroom. More than any other state, Nevada has a surplus of unoccupied lands, and a minimum of population. The advent of a new mine or a new mill is welcomed by all classes. Mining is the paramount industry of the state. Section 2456, 1 Revised Laws of Nevada, 1912, declares:

"Mining is the paramount interest of this state and is hereby declared to be a public use." The spirit of the people is in harmony with the spirit of the statute.

The testimony of Laizure, LosKamp and other witnesses, who had been at Millers since the time the mills were constructed, stated that herders had been warned by their employers to keep livestock away from the cyanide mills. No herds had ever been seen in or around Millers since the building of the town and the inauguration of the milling industry there. (Tr. pp. 288-9; 361; 248; 339). The particular road here in question had been used apparently for autos and

light rigs. (Tr. 151). Apparently horses in harness were the only livestock that ever used that road. Such animals do not drink dirty water lying in the ruts in the road, especially when they are just leaving a town or just entering a town, where suitable watering facilities are always available.

Therefore, in view of the record, it seems fair to say that this accident was not reasonably within the range of prevision. It was not such an accident as might reasonably have been anticipated. The legal principle involved in this angle of the case is well settled. It is illustrated by the case of *Gilman v. Noyes*, 57 N. H. 627, in which the defendant negligently allowed sheep to escape from an enclosure; thereafter the sheep were killed by bears; an unanticipated accident.

The principle is further illustrated by *Atchison, Topeka & Santa Fe R. R. vs. Calhoun*, 213 U. S. p 1; 53 L. Ed. 671. A passenger at a station stumbled over a truck, negligently placed about seventy-five or one hundred feet from where passengers were expected to be. The court said that the railroad could not anticipate that a passenger would use that part of the platform and that the defendant railroad was not liable for unforeseen conditions or for accidents not likely to happen.

This aspect of the case further negatives the contention that there was any wantonness in the defendant's conduct.

(b) Plaintiff's brief contends that defendant violated Section 6546 of the Nevada Revised Laws, 1912, which makes it a misdemeanor to

leave any unwholesome substance upon or near a highway or road for public travel on land or water. The gist of the statute is quoted on page three of plaintiff's brief.

The statute was enacted in 1912.

It was repealed, so far as mills are concerned, in 1913, by Statutes of Nevada, 1913, page 405. The latter act reads as follows:

"Any person or persons, firm, company, corporation or association in this state, or the managing agent of any person or persons, firm, company, corporation or association in this state, or any duly elected, appointed or lawfully created state officer of this state, or any duly elected, appointed or lawfully created officer of any county, city, town, municipality, or municipal government in this state, who shall deposit, or who shall permit or allow any person or persons in their employ or under their control, management or direction to deposit in any of the lakes, rivers, streams and ditches in this state any sawdust, rubbish, filth, or poisonous, or deleterious substance or substances, liable to affect the health of persons, fish, or livestock, or place or deposit any such deleterious substance or substances in any place where the same may be washed or infiltrated into any of the waters herein named, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be fined in any sum not less than fifty dollars, nor more than five hundred dollars, exclusive of court costs; provided, that nothing in this act shall be so construed as to permit mining or milling companies to dump tailings direct-

ly into any stream in this state so as to prevent or impede the natural flow of such streams. Nothing in this act shall be so construed as to apply to any quartz mill or ore reduction works in this state."

So far as the legislative policy of this state is concerned, the Statute of 1913 seems plainly to contemplate the difficulty and practical impossibility of absolutely impounding tailings. The theory of the statute fits into the case at bar. The Nevada Legislature has refused to impose a criminal liability upon a company for allowing slimes to escape. We do not pretend to say that the statute would relieve a milling company from a civil liability for negligence. It is a penal statute. But the text and tenor of the statute seem plainly to disclose a legislative recognition of the physical nature and habits of tailings, and to take cognizance of the problems confronting the industry as particularly detailed in another part of this brief in our review of the testimony of Superintendent Heydenfeldt and others concerning the impoundment of slimes.

Assuming that Section 6546 is not repealed and is still in full force and effect, and that we did violate it, nevertheless the defense of contributory negligence is not eliminated. The rule relied upon by plaintiff's counsel is not an absolute rule. A defendant's violation of the law does not in all cases operate as a deprivation of the de-

fense of contributory negligence. A review of the cases seems to warrant the following deductions: (a) the defense may be eliminated where the injury is wanton; (b) it may be eliminated where the act of defendant is *malum per se* instead of *malum prohibitum*; (c) it may be eliminated in cases where a defendant injures plaintiff after discovering plaintiff's danger in cases where human life and bodily safety are concerned.

"A statute creating a duty towards a particular class, or directing precaution against certain consequences to persons in general, does not abrogate the law of contributory negligence. The fact that the defendant was engaged in violation of the law will not excuse the plaintiff's recklessly exposing himself to danger. And the rule is the same although the defendant's act is regarded as negligence *per se*."

21 A. & E. Encyc. of Law, (second) 483, Par. "12."

In *Nickey v. Sleuder*, 73 Northeastern 117, an Indiana statute made it a misdemeanor to employ children under 14 years of age. In that case the defendant employed a boy under the statutory age. He was injured in the course of his employment; struck by a piece of timber. The court said: "The employment of a person under fourteen years was negligence, *per se*, and they are liable to such person for any injury of which that was the proximate cause, provided the party injured was not guilty of contributory negligence."

Queen v. Dayton Coal & Iron Company, 30 L. R. A. 82 (Tenn.): A Tennessee statute made it a

misdemeanor to employ a boy under twelve years of age in a mine. The statute prescribed a penalty by fine or imprisonment or both. Queen, a boy of ten years, was working in the mine. The boy had been warned against jumping on and off of cars. He was injured by jumping off of one of the cars. The defense was contributory negligence. The Court: "We hold that the breach of the statute is actionable negligence whenever it is shown that the injury was sustained by the consequence of the employment. This view of the case does not preclude the defense of contributory negligence on the part of the plaintiff * * * the effect of such statutes is simply to make the failure to comply with their requirements negligence *per se* and not to excuse negligence in other persons."

Dorsam v. Kohlman, 20 L. R. A. 881, (n. s.) (La.): The statute was similar to the Tennessee statute last-above mentioned. The plaintiff was warned to keep away from certain machinery. Though under the statutory age, the court found that he was a mature boy and understood the danger and the purport of the warning. He disregarded the warning and was hurt. It was held that the violation of the statute did not bar the defense of contributory negligence. The disregard of the warning barred the plaintiff's recovery.

Harris v. Hatfield, 71 Ill. 298: The Illinois statute made it a crime to import Texas cattle into Illinois. Defendant violated the statute. Plaintiff intermingled his own cattle with the Texas cattle. Upon discovering that they were

Texas cattle, the plaintiff still retained possession and control over them, without segregating the latter. The Texas cattle communicated a disease to the plaintiff's cattle. Recovery was denied.

Akers v. Chicago, Minneapolis & St. Paul R. R., 60 A. & E. R. R. Cas. p. 30, (Minn.): Defendant violated the statute requiring frogs to be blocked. The defense of contributory negligence was not eliminated. The court said the same rule would apply whether the statute conferred a civil action for damages or imposed penalties for its violation.

Platte & Denver Canal Co. vs. Dowell, 30 Pac. 68, (Colo.): A Colorado statute required all ditches and canals in the city of Denver to be flumed or confined. A penalty was imposed for violation. Plaintiff's decedent was drowned in an uncovered canal. The plaintiff recovered in this action upon the ground, as stated by the court that "no contributory negligence had been shown" on the part of decedent.

Wise v. Morgan, 44 L. R. A. 548 (Tenn.): The statute made it a misdemeanor for druggists to omit the customary poison labels from bottles containing poison. *Held*: that violation of the act would not defeat the defense of contributory negligence.

There are cases holding that the original wrong-doer is liable for all eventualities which are in any manner connected with the original misconduct. Such cases are illustrated by selling a pistol to a small boy, or sending explosives through the mail, and by other cases falling with-

in the classification first hereinabove mentioned under this subdivision of the brief.

We find no case where recovery has been awarded to an adult in the full possession of his faculties, who deliberately exposes himself to a danger after having been explicitly warned and cautioned.

McGarry's disregard of the warning is the proximate cause. It bars plaintiff's recovery.

The Supreme Court of the United States and many of the lower federal courts have spoken in no uncertain tone concerning the legal effect of the conduct of a plaintiff who disregards and ignores a warning against danger.

Baltimore & Potomac Ry. Co. v. Jones, 95 U. S. 439; 24 L. Ed. 506: Employees were returning from work on a work-train consisting of an engine, tender and box car. Jones was riding on the engine pilot. He was warned not to do so. He was injured by the work train colliding with a string of cars which had been negligently left in a tunnel. The disastrous consequences that might result from such negligent conduct on the part of defendant may be said to be more within the range of prevision than the occurrence of the accident under review in the case at bar. Jones was denied a recovery.

The Court: "One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts.

The question in such cases is: (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that but for such negligence, or want of care and caution on his part, the misfortune would not have happened."

"In the former case, the plaintiff is entitled to recover. In the latter he is not. * * *

"The plaintiff had been warned against riding on the pilot and forbidden to do so. * * * His injury was due to his own recklessness and folly. He was himself the author of his misfortune. * * * If the Company had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the court to give such direction, and error to refuse."

St. Louis & San Francisco R. R. v. Schumacher, 152 U. S. 81; 38 L. Ed. 361: The case has many points in common with the Jones case, *supra*. The plaintiff rode on a flat car. He was warned not to ride there. He was injured through defendant's negligence. The court said the case should not have gone to the jury.

Guild v. Pringle, 145 Fed. 312 (Fourth C. C. A.): Pringle fell into a street excavation made by sewer contractors.

Court instructed: "If plaintiff was wanting in ordinary care, and for want of such care fell into the shaft, plaintiff cannot recover, even if you conclude defendants were negligent. The law is absolute on this point. No one can hold

another responsible for negligence if he himself did not use his senses, did not use ordinary care, and this failure was the immediate cause of the injury. I charge you the law is as follows: 'If conditions around the shaft were of such character as to put passersby on notice that the shaft was there, and of its dangers * * if a person be *warned* that it was there—then the duty devolved on such person to use reasonable caution in avoiding it.' ” The instruction was approved.

Frank v. Suthon, 159 Fed. 174, and *McConnell v. Fernley*, 48 La. Ann. 1433, 34 L. R. A. 609: A Louisiana statute made the owner of a building liable for injury caused by lack of repairs or resulting from dilapidated conditions.

Plaintiff stepped on a decayed balcony; fell and was injured.

In *Frank v. Suthon*, commenting on the *McConnell* case, the United States District Court said:

“On the statement of facts made in the opinion of the Supreme Court, the judgment in favor of the defendant (the owner) in the *McConnell* case was clearly correct. The plaintiff was a guest or visitor of the tenant of the house, and while in the house was warned not to go on the gallery as it was in a dilapidated condition and might fall. She disregarded this warning and with other visitors went suddenly on the gallery and by her weight and that of her companions, and by the impetus and jarring of their movements caused the very collapse of the danger of which she had been warned. Her own imprudence brought the accident upon her. Conceding

that the owner was under an obligation, as to her, to keep the gallery safe, still, when she knew it was unsafe and very likely to fall, and had been expressly told not to go on it, if she chose to go on it and expose herself to the chance of a fall, she had no right to incur this danger at the risk of the owner. The judgment rejecting her demand for damages against the owner was therefore manifestly correct."

Hart v. Northern Pacific Railway Co., 196 Fed. 180, (8th C. C. A.): Starr was a cattle drover. He had two cars of cattle in the railroad yards. He was walking about the yards making inquiry as to when the cattle train would start. He was warned to look out for train No. 5, a through train, presently due. A short while thereafter, Starr was walking between two tracks upon one of which the through train was approaching. A freight train was standing on the other track. Starr was struck and killed. There was conflicting evidence of the unlawful speed of the train and of the failure of the engineer to give any signals by the whistle or the bell. The trial court instructed for the defendant. Affirmed in the Circuit Court of Appeals. The upper court said that the warning and the environment imposed upon Starr "the utmost degree of diligence;" that the railroad yard, in operation, "is per se a warning;" "great is his peril, and proportionately great should be his effort to protect himself. * * * The law of the national courts and of the state courts, when unaffected by local statutes, is that one whose injury or death is occasioned by negligence of his own, which in any degree

proximately contributed to it, cannot recover from another whose negligence also contributed to it, or whose negligence may have been the primary cause of it."

The court further said there was no ground of recovery unless, after discovering Starr's danger, the defendant could have avoided the injury, but failed to do so.

"But in the application of this rule, care must be exercised to avoid undermining the rule of contributory negligence * * *. The difference between a cause of action for the primary negligence and one for the secondary negligence referred to in that case is striking. In the first case the defendant would be liable if by the exercise of reasonable care he ought to have known or anticipated plaintiff's danger and failed to exercise ordinary care to avoid injuring him, but such liability would be defeated if the plaintiff in any way directly contributed to his own injury."

"In the other case no liability would arise unless the defendant actually knew of plaintiff's peril and thereafter failed to exercise ordinary care to avoid injuring him; in such case the defensive effect of the original contributory negligence would be entirely eliminated."

Certiorari in the last-mentioned case was denied. 226 U. S. 609; 57 L. Ed. 380.

Grand Trunk v. Ives, 144 U. S. 408; 36 L. Ed. 485:—This is a "railroad crossing" case.

The Court: "With respect to the question of the alleged contributory negligence of the deceased, the court charged the jury as follows:

“Turning now to the conduct of Smith and subjecting that to the same test of reasonable prudence and cautious conduct of a person in his situation, you will understand that, no matter how negligently the company ran this train or how unreasonably they neglected to provide sufficient safeguards at the crossing, if he brought his death upon himself by his own negligence, his administrator is not entitled to a verdict in this suit.’ * * *

“These instructions are so full and complete, and are in such entire accord with the rules of law applicable to cases of this character, that no fault whatever can be found with them. They embody, substantially, the entire law of the case, on the questions under consideration.”

Under this branch of the case we also rely upon the cases cited in Judge Farrington’s Opinion. (Tr. p. 32).

The variety and complexion of the cases is endless. It seems futile to multiply instances. The rationale of the cases is that it would be against public policy to allow recovery to one who ignores a warning. A plaintiff cannot say “I have been warned of the danger arising from defendant’s negligence. Nevertheless, if I am injured I can make the defendant pay me damages. I’ll take a chance.” Sound legal principle is not susceptible of such an application, and the courts will not put a premium upon deliberate foolhardiness and premeditated cupidity. It is our conviction that no approved line of cases can be found in the books holding a defendant liable for an injury that is directly superinduced by an act of imprudence and folly such as McGarry

exhibited in this case, in the face of specific warnings such as he received from Floathe, Bohannan and Acree, and also such as he admits he received from Fickes; and also such warning as the presence and operation of the cyanide mill itself imported.

Plaintiff violated the livestock laws of Nevada. Plaintiff's unlawful conduct, in these particulars, was a concurring, contributing, proximate cause of the injury.

1 Revised Laws of Nevada, (1912, Section 2317 provides as follows:

"2317. Sec. 1. It shall be unlawful for any person to herd, or cause to be herded, or grazed, any number of sheep on any unoccupied land within a radius of three miles of the Postoffice of any town or village that has a population of fifty or more persons; provided, that this Act shall not apply to sheep driven to a railroad to be shipped or sheared."

"2318. Sec. 2. Any person who, for himself, or as agent or employee of any other person, firm, corporation, company or association, shall violate the provisions of section 1 of this act shall be deemed guilty of a misdemeanor and shall upon conviction thereof, be punished by a fine in any sum not less than fifty dollars nor more than two hundred dollars for each and every offense, or by imprisonment in the county jail for a period of not less than twenty-five days nor more than one hundred days, or by both

such fine and imprisonment as the courts may order.”

The population of Millers is two hundred and fifty. (Tr. 358).

Plaintiff's sheep were not being driven to a railroad. Their destination was Rawhide, Nevada. There is no railroad there. (Tr. 394).

1 Revised Laws, Sec. 2319:

“It is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded, on the land or possessory claims of other persons,

“or to herd the same or permit them to be grazed within one mile of a bona fide home or bona fide ranch house;

“provided, that nothing in this act shall prevent the owners from herding or grazing their sheep on their own lands;

“and provided further, that nothing in this Act shall be so construed as to prevent sheep being driven along any public highway.”

As noted in another part of this brief the plaintiff's sheep were not “being driven along any highway.” They were not on the highway during any time they were at Millers except at the very moment when they were driven, from the open sagebrush country, into the pool, on the highway, at noon, February fifth. They grazed right past the Fickes home. In fact they were grazing all the time within a mile of nearly all the residences in Millers.

Section 2335:

“It shall be unlawful for any person to herd or graze any livestock upon the lands

of another without first having obtained the consent of the owner or owners so to do.

* * * This Act shall not apply to any livestock running at large on the ranges or commons."

These sheep were not running at large. They were in charge of two men.

Plaintiff violated all of the above statutes. There is no conflict or dispute on the facts.

The sheep were twenty-four hours at Millers. (Tr. p. 163). McGarry says: "There was good feed around there." (Tr. p. 163). He further says that the sheep grazed from five to seven hours on February fourth and fifth; and that Lamont herded them while they were grazing. (Tr. p. 163). Lamont started with the sheep at seven o'clock on the morning of February fifth (Tr. p. 174). They reached the pool in the road at noon. During the five-hour interim period they described a crescent-shaped course through the sagebrush, about one mile in length, (Tr. 371) grazing all the while.

The map exhibit shows the course of the sheep on the fifth. At all times the sheep were within the inhibited territory specified in the statute. (Tr. 357). By McGarry's own testimony they were herded and grazing on the day of the accident, *and at the time of the accident*, and within the limits inhibited by the statutes. The Fickes home had been occupied by Fickes and wife for a period of six years. (Tr. p. 305).

Plaintiff had no consent or permit to be on defendant's property. (Tr. p. 392). The map shows the defendant's property line (Tr. p. 363); defendant's Exhibit No. 1. The defendant holds title by patent direct from the United States Government (Tr. pp. 425-6-7). Defendant should be given the protection of the statute, requiring plaintiff to secure a permit. If the plaintiff had asked for it, defendant could have given plaintiff a further warning, if any further warning was needed.

The District Court said: "There is, however, no evidence that the sheep were herded or grazed on defendant's land, or anywhere else on the day mentioned." (Tr. p. 33).

The court inadvertently overlooked the undisputed admission of McGarry, *supra*.

The Answer alleged all of the foregoing unlawful acts of the plaintiff as separate affirmative defenses. (Tr. pp. 12, 13, 14, 15). The Answer also similarly alleged proximate cause, and knowledge of the plaintiff, and warning. (Tr. pp. 15, 16, 17, 18). No Replication was filed to the Answer.

The Statutes of Nevada, 1913, Chapter 212, page 300, defining the office of the Answer and the Replication, provides:

"Sec. 2. The Answer of defendant shall contain a statement of any *new matter* constituting a defense or counterclaim. * * *

"When the Answer contains new matter constituting a defense, or a counterclaim, the plaintiff shall, within ten days after the service of the Answer, or within ten days

after notice of the overruling of the demurrer thereto, serve and file a reply, which reply shall consist of:

"1. A general or specific denial of the allegations in the Answer or in the counterclaim intended to be controverted by the plaintiff. .

"2. Any new matter, not inconsistent with the complaint, constituting a defense to the matter alleged in the Answer.

"If the plaintiff fails to demur or reply to the new matter contained in the Answer, constituting a defense, the same shall be deemed admitted."

The foregoing statute was in effect at the time of the trial.

In view of the foregoing considerations, we submit (a) that the warnings are admitted; and (b) that the illegal conduct of the plaintiff is admitted.

The constitutionality of statutes similar to the Nevada live-stock laws has been upheld in Idaho and by the Supreme Court.

Walling v. Brown, 72 Pac. 960.

idem 76 Pac. 319.

Bacon v. Walker, 204 U. S. 311.

(a) Assumption of risk and contributory negligence:

Under the pleadings and the facts, plaintiff assumed the risk. Plaintiff had knowledge, or the means of knowledge, and is held answerable for the result.

"Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result

complained of, under the circumstances known to the actor, that he is held answerable for that result, though it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground." * * * "The difference between the two is one of degree rather than of kind." 8 U. S. Cyc. 877.

It is a matter of conduct. It does not depend entirely on the relation of master and servant, though most frequently applied to such cases. Independent of such relation, there may be a voluntary assumption of a known risk which will debar one from recovery.

In *Allen v. Johnson*, 76 Mich. 31, 42 N. W. 1075, plaintiff, who had rented a part of defendant's planing mill to work in, and who had the right of entrance, was injured by timbers thrown from a door in an upper story by defendant's servant. The timbers were being thrown down to be loaded into a sleigh standing in front of a lower door, and, when the sleigh was about half loaded, plaintiff, who could see it plainly, stepped out of the door, and was injured. Plaintiff knew defendant's mode of doing business, and that timbers were usually passed in and out at the rear doors, and that the lower front door was the usual place of entrance. It did not appear that plaintiff was noticed by defendant's servant, or that the latter might have reasonably expected any one to pass out of the lower door at that time; nor was it shown that plaintiff's business required him to be there then. *Held*, that plaintiff could not recover for the injury, as he must be held to have assumed the risk.

Common illustrations are the man who ignores the "Beware of the dog" sign; the man who has knowledge of the existence of spring guns on a property, and notwithstanding the knowledge and the warning, goes upon the property.

Hott v. Wilkes, 3 Barnwell and Alderson, 304, is probably the leading "spring gun" case, in which case the court says: "He voluntarily exposes himself to the mischief. He is told that if he goes onto the premises he will run a particular risk. There is no right of action."

There is a further illustration in 72 Atlantic, 1059, at page 1061: "A pedestrian on a public highway may fairly presume that it is fit for use, but if he knows of the existence of danger, or if he ought to know it, and runs into danger, he assumes all risk."

Another highway case is *Sherman vs. Fall River Iron Works Co.*, 2 Allen (Mass.) 524; 5 Allen 213. The plaintiff was engaged in the livery business; as part of the business he had to water his horses at a well; defendant had laid some gas-pipe by his property, and in such a negligent and imperfect manner, that the gas escaped, and impregnated and polluted the water of the well. There was clear negligence on the part of the defendant. The court held that the plaintiff may recover for the inconvenience to which he has been subjected, and expenses incurred in the reasonable and proper attempt to exclude the gas from the well; but he was allowed no recovery for the injury caused by allowing his horses to

drink the water after he knew that it was corrupted by the gas.

In *Miller v. Merchants Manufacturing Co.*, 150 Mass., 362, Justice Holmes says that the duty of the defendant reaches the vanishing point in the case of those who are cognizant of the full existence of the danger, and voluntarily run the risk.

In *Dribble v. Sioux City*, 38 Iowa, 390, the plaintiff, owning a horse, allowed it to run at large in the vicinity of a highway where there was a hole or defect in the street, caused negligently, and allowed negligently to remain. The horse fell into the hole, and was killed. The court said: "The plaintiff had equal, if not more knowledge, than the defendant of the excavation, and with such knowledge he turned his horse loose in its vicinity. The conduct of each party must be tried by the same standard or test. If the defendant had reason to apprehend injury from the excavation, so also had the plaintiff. If the defendant was negligent in permitting an excavation to exist without barriers to keep stock from falling therein, the plaintiff also was negligent in turning his animal loose near it, knowing its condition. The same facts which show the negligence of one show the contributory negligence of the other."

Another cattle case is 48 Northwestern, 406, *La Riviere v. Pemberton*. The servant of the plaintiff, in charge of his cattle, allowed them without necessity, to go at large in the vicinity of a frozen lake, where the cattle were accustomed to drink; two of the cattle were drowned in the hole which the defendant negligently had made, and negligently allowed to remain. It was held

that the contributory negligence of the plaintiff through his servant knowing the condition, prevented him from recovering damages against the defendant.

The case of *Beinhorn v. Griswold*, 69 Pac. 557, where trespassing cattle were killed by cyanide (reviewed in the opinion of the District Court herein, Tr. p. 37) is germane to the case at bar, because plaintiff's sheep were, at the time of the accident, trespassing on defendant's lands, without permit, and contrary to the statutes of Nevada.

The following citations are highway cases, sustaining the foregoing principles, and some of them holding that no matter how negligent a defendant may be in causing a defective highway, that fact alone will not entitle the plaintiff to recover; the plaintiff must go further, and show affirmatively that he was using ordinary care and diligence in traveling the road; that he was not guilty of any negligence which was a probable cause of the injury, or contributed to it in any degree; and that if he has knowledge, or if he ought to have knowledge of the defect, or if he has been warned, he assumes the risk and cannot recover; and that it is his duty to learn of the danger where he has opportunity to do so, and avoid it, if possible.

Grandorf v. Citizens Ry., 113 Mich., 496;

White v. People's Railroad Co., 72 Atl., 1059, 1061.

Whitman v. Fisher, 57 Atl., 895;

Kent v. Southern Telephone Co., 48 S. E., 399;

Thompson v. Bridgewater, 24 Mass., 188;

Phillips v. Ritchie, 7 S. E., 427;

Duncan v. Greenville, 53 S. E., 367.

(b) Plaintiff's illegal conduct, being a concurring, contributing, proximate cause, bars a recovery.

"The voluntary illegal conduct of plaintiff, when a proximate or concurring cause of injury is a bar to his recovery."

38 Cyc. 529, Par. "E."

Gilmore vs. Fuller, 65 N. E. 84, is an illustrative case. The litigants were members of a serenade party. In the midst of the frolic they were violating the law against firing off pistols. Plaintiff was injured by the defendant's negligence. There was no recovery.

In Dribble v. Sioux City, *supra*, plaintiff's horse was at large in violation of law. Held, an additional ground for denying recovery.

Sherman v. Iron Works Co., 5 Allen (Mass.) 213: Plaintiff's livery stable business was conducted in violation of law, i. e., without a license. Plaintiff's horses were injured by gas, negligently allowed to escape. No recovery.

It was our reasonable expectation that livestock men would not come into that locality. For all practical purposes the law forbade them coming there. This aspect of the case further negatives the charge of wanton conduct on the

part of defendant, and further supports our contention that this particular accident was not reasonably within the range of prevision. Situated as we are in a locality shunned by livestock men, who have never come there since we established the industry in 1906, we think it reasonable to say that we could not foresee the probability of such an injury.

Holcomb, one of the officers and owners of the plaintiff corporation, arrived in Millers the day after the accident. "There was a general discussion as to the actions of the man (McGarry), it was something almost unbelievable, and we were discussing it generally." (Tr. 418). Heydenfeldt said: "Why in the world would a man bring sheep to such a place?" The answer of the veteran sheep-man was, "I don't know." (Tr. 394). Holcomb had not one word to offer in justification of McGarry's conduct.

Viewing the record and the law, as hereinabove set forth, we submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

Hugh H. Brown
J. H. Evans

HUGH H. BROWN,
J. H. EVANS,

Attorneys for Defendant in Error.

No. 2619

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Sierra Land and Livestock Company

(a corporation)

Plaintiff in Error.

vs.

Desert Power and Mill Company

(a corporation),

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

SWEENEY & MOREHOUSE,

Counsel and Attorneys for

Plaintiff in Error.

Filed this.....day of....., 1915.

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

No. 2619

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vs.

Desert Power and Mill Company (a corporation),	<i>Defendant in Error.</i>
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**Brief of Plaintiff in Error, Upon Writ of Error, to
the United States District Court of the
District of Nevada.**

STATEMENT OF THE CASE

The facts so far as may be necessary to present the legal questions involved, may be stated in a few words. The defendant corporation was the owner of a reduction plant, and on the 5th day of February, 1914, was engaged in the business of milling and reducing gold and silver-bearing ores in the immediate vicinity of the town of Millers, in the County of Esmeralda, in the State of Nevada. In conducting its business large quantities of cyanide and its chemical compounds were used, which is a quickly acting and

deadly and virulent poison to animal life, all of which the Defendant well knew. The Defendant therefore, maintained near and at its plant, artificial reservoirs, ponds or pools, for the purpose of impounding and retaining the cyanide and its compounds. The lay of the land sloped from the plant toward the town of Millers, and its travelled road coming into and going out of Millers. These impounding pools, or reservoirs, gave way, and the water therefrom, containing cyanide and its compounds, ran down upon, and over and across, the well-travelled road leading into and out of Millers, and settled in pools and ruts in said road. There had also been heavy rains, which, added to the cyanide pools in the road, gave these pools the appearance of bodies of rain-water, and suitable for the watering of sheep or other stock. The Defendant knew that its impounding reservoirs had broken, and that its cyanide waters had ran down, to and across the travelled road, and stood in pools in said road, mixed with rain water, on the 5th day of February, 1914, and that the road, although not a laid out and dedicated public road, was the main travelled road, and that it was and had been so used for several years. The Defendant also knew that its cyanide waters was a deadly poison, and that stock of any kind travelling along said road, were likely to drink of said waters. The defendant kept no guard, nor did it put up any signs or give any notice, of the dangerous character of said waters.

On the 5th day of February, 1914, the Plaintiff, through its sheep-herder and camp-tender, drove down said road, a herd of about 1600 head of sheep, and they drank of the waters in the pools in said

road, thus impregnated with cyanide, and 1095 head of said sheep were speedily poisoned and died. The lands for miles along the said travelled road on either side, was unfenced. The decision of the Court holds that the Plaintiff was guilty of contributory negligence, and cannot recover, because the camp-tender had been told, not by any agent or employe of the Defendant, that the water in the road **might** contain cyanide. The legal questions are: First, Can the Defendant set up as a defense, contributory negligence? Second, Does the answer in this case raise such an issue under the law applicable to pleadings in Nevada? Third, Do the facts in this case constitute contributory negligence. Fourth, If in a Federal Court, contributory negligence is an affirmative defense, has Defendant established the same by a preponderance of evidence? Fifth, That the Court erred in holding the Plaintiff barred by contributory negligence. This is a summary of the facts and points raised by the assignments of error, which we shall take up, separately, by reference to the testimony and authorities.

I

Under our law in Nevada, Section 6546, Revised Laws, it is provided:

“Every person who shall deposit; leave or keep, on or near a highway or route of public travel, on land or water, any unwholesome substance * * shall be guilty of a misdemeanor.”

By this section the deposit of cyanide water upon this road of public travel, was a crime. Can the defense of contributory negligence be set up against an act which is criminal, and which act must of

necessity be the proximate cause of the death of the sheep? For what is a proximate cause? The best definition which we can find, is that stated in

City of Winona vs. Botzet, 169 Fed. 321, where the U. S. Circuit Court of Appeals of the Eighth Circuit says:

“The proximate cause of an injury is the **primary moving** cause, without which it would not have been inflicted, and which is the natural and probable consequence of events, without the intervention of any new and independent cause produces the injury.”

And the Court says in that same case, at pp. 328 and 329:

“The **proximate** cause of an injury is the **primary moving** cause **without which** it would not have been inflicted, but which, **in the natural and probable sequence** of events, and without the intervention of any new or independent cause, produces the injury. The **intervening** cause that will insulate the original wrongful act or omission from the injury and **relieve** of liability for it must be an **independent** intervening cause which **intercepts** the **natural sequence** of events, **prevents** the ordinary and probable result of the **original** act or omission, and produces a **different** result, which could not have been reasonably anticipated.”

This to our minds is the true rule. First, The **primary** and moving cause, is the cause, **which without** it would not have inflicted any injury. Now **no injury** could have been **inflicted** had there been no cyanide in the water. Second, The natural and probable **sequence** of cyanide in the water, was death

to the sheep. Third, This sequence or result, prudence and forethought could not fail to comprehend, know and understand. Fourth, The independent cause must interrupt the **natural** sequence of the events of the primary cause. Fifth, And the **intervening** cause must produce a **different** result, which could not be foreseen, or anticipated.

Otherwise, the **proximate** cause is the **event**, which ordinary prudence could have foreseen and knew. The Defendant knew that cyanide was poison. That animals, being thirsty, would drink water. That water flowing or being deposited in pools or ditches near or in a travelled way, would be drank by thirsty animals. That if they so drank, death would ensue. It knew that drinking of water by animals, is not a **cause**, but a **result**. Therefore, the drinking of the water by the sheep was not an independant cause, but only a **link** in the chain of causation. And besides, the Plaintiff had a right to **presume** that the Defendant would not violate the law and permit poisoned water to stand in pools or ponds or cross the track of a travelled road, in an open and unfenced tract of land, where persons or animals might drink and be poisoned, without Defendant giving some kind of warning by signs or a guard.

Robinson vs. W. P. R. R. Co., 48 Cal. 409.

Franklin vs. Motor P. Co., 85 Cal. 70.

Solen vs. Virginia City, 13 Nev. 125.

Benten vs. C. P. R. R. Co., 14 Nev. 361.

Again the rule is "If the contributory negligence was of a **negative** character, such as lack of vigilance, and was itself caused by, or would not have

existed, or no injury would have resulted from it, **but for the primary wrong**, it ought not * * * in reason * * * or in law, be charged to the injured one, but rather to the original wrong-doer."

Wabash etc. vs. C. T. Co., 23 Fed. 738.

Now, the primary wrong was cyanide in the water. Had there been no cyanide in the water, no harm would have resulted. Drinking of water by the sheep was not negligence, or wrong. The **cause** of **death** was not the drinking of water by the sheep, but the **poison** in the water.

So again, as Mr. Beach on contributory negligence says, Section 24, Second Edition, "The Courts declare, and it is a settled rule of law, that, not only must the negligence of one injured by another's culpable neglect contribute to produce the injury, but that, if it is to constitute contributory negligence, it must contribute as a **proximate cause**, and not as a remote cause or mere condition."

It will thus be seen that to make contributory negligence a defense, it must of itself be the proximate cause of the injury or damage.

This is very prettily stated in the notes to

Merrill vs. L. A. Gas etc., 139 Am. St. 134.

Which will be seen, is strictly applicable to this action, for it is said:

"If a person by his negligence produces a **dangerous condition of things**, which does not become **active** for mischief until another person has operated upon it, by the commission of **another negligent** act which

might not unreasonably be anticipated to occur, the original act of negligence is regarded as the proximate cause of the injury which finally results. The principle is, that the **first act** is regarded as being **continuous** in its operation up to the time of the second, and therefore, for the purpose of fixing the defendant's liability, the two acts are treated as contemporaneous. **If the original negligence operates with the intervening cause, then it becomes the proximate cause by the continuity of its action."**

It will thus be seen that where the act of negligence of the defendant is a **continuous** act, it is the proximate cause; or, to put it as Judge Henshaw says in

Merrill vs. L. A. Gas etc., 139 Am St. p 138.

"The independent wrongful act, to constitute the proximate cause by displacing the original primary cause, must be so disconnected in time and nature as to **make it plain** that its damage occasioned was **in no way a natural or probable consequence** of the original wrongful act or omission."

The poison was in the water. That was an act of the defendant. No notice was posted, no employe stationed to give warning. Any person or animal drinking the water was sure to be poisoned. The Defendant knew that. Up to the drinking of the poisoned water by the sheep, the negligence of the defendant was continuous. The drinking of the water was an innocent act.

And the Supreme Court of the United States says in

Milwaukee etc. vs. St. Paul etc., 4 Otto 469,

“The question always is, was there an unbroken connection between the wrongful act, and the injury, a continuous operation?”

Now the flowing of the cyanide into pools upon the road, must of necessity, have been a continuous danger. Being a continuous danger, that fact must necessarily be the proximate cause, for without it no danger could have taken place. These seem to us to be the rules, then, that where contributory negligence is **not the** proximate cause, it constitutes no defense.

II

Now, another rule also provides, that where the negligence of the defendant is willful, or wanton, contributory negligence is no defense.

Sec. 67 Beach on Contributory Negligence,
2nd Edition.

Where it is said, “When the defendant, by his own negligent or wrongful acts or omissions, constituting a breach of legal duty, throws the plaintiff off his guard, or when the plaintiff acts in a given instance upon a reasonable supposition of safety, induced by the defendant, when there is, in reality, danger, to which the plaintiff is exposing himself, in a way and to an extent which, but for the defendant’s inducement, might be imputed to plaintiff as negligence, sufficient to prevent a recovery, such conduct on the part of the plaintiff, so induced, will not constitute contributory negligence in law, and the defendant will not be heard to say that the plaintiff’s conduct under such circumstances is negligent for the purposes of the action. The defendant by his own negligent conduct, which has occasioned the

conduct of the plaintiff, is estopped, in a certain sense, from making the defense that the plaintiff's conduct was negligent, or in other words, he is not allowed, first to induce the plaintiff to be careless, and then to plead that carelessness as a defense to an action brought against him for the mischief which has been the result. The defendant must not take advantage of his own wrong in such a way as that."

Apply this rule to the case at bar. Here the cyanide ran down to, over and upon the travelled way. There was nothing to show or indicate in the evidence any act of the defendant that there was any cyanide in this water. Nothing to put plaintiff on his guard. He had the right to presume all was safe. There were no signs. No guard stationed to warn anyone. Any person or animal was, if thirsty, led to believe that the water was pure and wholesome. The defendant knew it was poisonous, and in utter disregard of the results, made no effort to protect the public against its dangerous character. Why should the Plaintiff pause for any moment, so far as the conduct of the Plaintiff was concerned, from watering its sheep in these pools.

In *Kentucky etc vs. Gastineux*, 83 Ky. 1119, It is said, "Wilful neglect is an intentional failure to perform a manifest duty in which the public has an interest or which is important to the person injured, in either preventing or avoiding the injury."

Can the defendant leave its deadly cyanide in pools, upon a well-travelled road, and not be held to wilful neglect? Can it taken advantage of its own wrong, and plead contributory negligence, to an act,

which it knew, was dangerous to life of man or animals, and do nothing,—make no sign, give no warning?

Now, in Birmingham etc. vs. Bowers, 110 Ala. 328,

It is said, “In wanton negligence, the party doing the act or failing to act, is conscious of his conduct, and, without having the intent to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury.”

Here the Defendant knew that cyanide was a deadly poison, and was fully conscious that its act was likely to produce injury.

If the Court will refer to paragraphs VI and VII of the complaint, on pages 2 and 3 of the transcript, the Court will find these facts and full knowledge clearly averred, and by reference to the answer, by the first paragraph thereof, on page 11 of the transcript, the Court will see that paragraphs VI and VII, of the complaint, are specially admitted. How then, can it, admitting its wilful negligence, set up contributory negligence as a defense?

See Sec. 64, Beach on Cont. Neg. 2nd Ed.

II

But it is claimed that the witness Acree, transcript p. 237, swore that the camp-tender, McGarry, who was the employee of the plaintiff, in a conversation with him, asked, “What is the water down there, cyanide or rain-water?” to which he replied, “Well,

I think it is rain-water; it has rained in there, but I wouldn't take a chance upon it if I were you."

Also, Trans. p 307,

Ficks, a witness for Defendant, said, referring to McGarry, "Well, he asked me about the water, and also asked me about cyanide; well, now the water we saw, I told him I didn't think there was, but I wasn't positive whether there was cyanide in it or not. I say, 'There might be.'"

And Bohannan, a witness for Defendant, pp. 281 and 282, says, "Acree laughed, and says, 'Why, I wouldn't take any chances on it being cyanide water; possibly could be.' 'No,' I says to him myself, 'I would not take any chances, either.'"

And Floathe said, Trans. p. 297, a witness for Defendant, "I asked him if that was his sheep, and he said 'yes,' then I told him that to be sure and keep them on that side of the track, on the south side of the track, and not get them on the north side, because if he did they would be liable to get into cyanide—get into water there, and I told him if they do you are liable to lose them all."

But, p. 299 Trans. it will be seen that this witness was not referring to this water in the road, but to his own slime pond, which was 300 or 400 yards away.

See page 300.

This is all the testimony upon which the defendant relies for contributory negligence, and upon which the Court based its opinion. But not one of these witnesses was an agent or employee of the Defendant, or had any authority to speak for it.

Now hear McCarry, page 104, Trans: "I asked him," speaking to Acree, "if that was cyanide water down there, and he says, 'No, that is rain-water,' he says, 'The cyanide water is all further over; it is all impounded.'" Also, page 136,

"Well, I went on down town, around there all afternoon, and I didn't inquire any more about the water; I didn't think it was necessary. I found out Mr. Acree told me that it was rain-water down there; I pointed out to him and I asked him 'Is that cyanide water?' and he says, 'No, that is rain-water; the cyanide water is impounded; it is further over.'"

Again, page 145,

"The pump man said he told this man (the herder) it was rain-water, and he thought it was rain-water."

Again, page 146,

"I called Pete up (the herder) and asked Pete if this pump man didn't tell him it was rain-water, and he said 'Yes.' And the pump man says, 'I did tell him it was rain-water, and I thought it was rain-water.'"

See pp. 156-157-158.

And on pages 159 and 160, McGarry says, "No, sir, he never did; if I had had half of the warning I was supposed to have got I would not have been anywheres near Millers. Do you suppose if half of these men had told me, that I would have to keep away from there; do you suppose if every man in town had come up and told me that, I would go down there with the sheep? I would have been an awful

fool if I did, to have every man come up and tell me it was cyanide water, and then go right down there to it."

Page 162,

"But I certainly had no idea in the world that it was cyanide water right in the road"

Peter Lamont, Plaintiff's witness, says, page 177:

"He say, 'Yes,' he asked him if he could give drink to the sheep? He told him it was raining water on the road." He say it was—that he thought it was rain-water in the road."

Page 186,

"Q. If these had been your own sheep, would you have watered them there?

"A. He say, yes, sure."

This covers the main testimony of the Plaintiff. From these extracts of the testimony it will be seen that **no person, no witness**, ever said there was cyanide in the water or gave any reason, or stated any fact, that would lead any person to believe that there was cyanide in the water. This was rain-water, apparently standing in pools in the road. Not a single witness knew there was cyanide in it. Acree thought there might be, not that there was.

III

In the Federal Courts, contributory negligence is a matter of defense, of which the **burden** of proof is **upon** the **defendant**, and consequently, reasonable presumptions in respect to matters not proven, or left in doubt, should be in favor of the injured party.

Wabash, Etc. vs. C. T. Co., 23 Fed. 738.

R. R. Co. vs. Geadman, 15 Wall. 401.

R. R. Co. vs. Narh, 93 U. S. 291.

Hough vs. Railway Co., 100 U. S. 213.

Geotzman vs. Portland, Etc., 54 Ore. 114.

Moulton vs. Aldrich, 28 Kans. 314.

Holmes vs. Ore. R. R. Co., 5 Fed. 523.

Town of Watertown vs. Green, 112 Fed. 183.

And the plaintiff had the right to **presume**, that the defendant would not permit poisoned water to stand in pools in the travelled road.

Franklin vs. Motor, Etc., 85 Calif. 70.

Franklin vs. Motor, Etc., 85 Calif. 70.

Salem vs. Vir. City, 13 Nev. 125.

Benton vs. C. P. R. Co., 14 Nev. 361.

Now then the burden of proof being on the defendant, it must establish the contributory negligence, by a preponderance of evidence.

Now then, the witnesses for the defendant, did not say, nor did they pretend to know, that there was cyanide in the water standing in the traveled road. They only said there "might be." They simply guessed. They gave no reason for their statements. They stated no fact. There was no statement that the impoundment had broken—or that the cyanide had escaped. They said nothing more than a mere guess, and as plaintiff had the right to **presume**, that the defendant had not permitted its cyanide to escape, he had the right to rely upon that presumption. Further, plaintiff's witnesses were

told it was "**rain water**. Rain water does not carry cyanide. All of defendant's witnesses testified it was rain-water, and on page 287, Transcript, Bohannan, witness for defendant says:

"Q. And it was generally thought around that neighborhood, that this was rain water that had come in there with the recent rains, and wasn't poisonous at all?

A. I think that was the opinion."

If that was the **opinion** of persons living there, why should plaintiff be held accountable for entertaining the same opinion, when McCarry and Lamont, its witnesses deny that any one told them or either of them, that it "might" contain cyanide? Would any sane man drive 1600 head of sheep up to drink cyanide water, when he knew or had reason to believe the water contained cyanide? Where then is the **weight** or preponderance of evidence? Certainly with the plaintiff. There was nothing to indicate cyanide or the escape of cyanide into the water. There was no notice, no guard by the defendant. There was nothing to warn plaintiff. Therefore, when plaintiff's witnesses testify that no one said other than it was rain water—and the acts of McCarry and Lamont are in harmony with a want of knowledge, and as "acts speak louder than words," there is no other conclusion that can be reasonably drawn, but that they had no other idea, but the water was rain water, for had they the slightest idea the water contained cyanide, they would never have driven the sheep to it to drink. Thereupon the weight of evidence, shows that the witnesses for the defendant, none of whom were employees of the

defendant, none of whom knew or pretended to know that there was cyanide in the water, are simply mistaken about the statement "might be," and the defendant utterly fails to show a preponderance of evidence.

Further plaintiff's witnesses had a **duty** to perform—were under a **responsibility** for the care and protection of the sheep—and therefore, would be **careful** and **considerate** of their acts and conduct, and **would not mistake** or **misunderstand**, what was said to them. But defendant's witnesses had no duty, no responsibility, no purpose of motive to remember what was said.

And this Court says, through Judge Hawley:

In Dauntless, 129 Fed. 715

"Self preservation is the first law of nature. We have the right therefore to look to the common experience of mankind, in order to determine whether the statement of McNeil is reasonable or not."

So here the preservation of the life of the sheep, must necessarily, become a factor in weighing this evidence, and we have the right to weigh the common experience of mankind. Is the common acts and conduct of men to drive their sheep to drink water, which they knew, or believed or had been told, contained cyanide.

But further Judge Hawley says, quoting Judge Wallace in 8 Fed. 729, "The natural instinct of self preservation in the case of a sober and prudent man stands in the place of positive evidence." If so the same rule must prevail as to the preservation of

property—particularly sheep from cyanide water.

So in *Blankman vs. Vallejo*, 15 Calif. 638, "The inherent improbability of a statement may deny to it all claims of relief." Can any one believe that if Acree, or Bohannon, or Floathe, had told McGarry, that there was cyanide in this water, or that there might be, he would have deliberately watered his sheep with such water? It is not within the range of belief or confidence. Therefore we affirm that defendant did not establish contributory negligence upon the part of the plaintiff, by a preponderance of evidence or any evidence.

IV.

But further, before contributory negligence can be established, it must be shown that plaintiff had knowledge of the danger to his sheep.

Sec. 36, Beach on Cont. Neg., 2nd Ed.

What knowledge did it have? None. Who said there was cyanide in this water? No one. Who said the reservoir had broken, and that cyanide water had escaped? No one. What notice had plaintiff's servants? None. Those two witnesses said there might be cyanide. Granted. But they were outsiders, and not servants of the defendant. Was such statement notice?

In *Bushman vs. Kelly*, 38 Minn. 197, it is said in speaking of notice of defect in title to real property:

"It is essential quality of notice, that it appear to be given by competent authority, and a notice by a mere stranger can express nothing."

But a mere statement that there **might** be cyanide, certainly cannot be notice. There is no **fact** stated of any kind. Nothing carrying or giving any knowledge, or directing attention to any fact, which would lead to knowledge and overthrow the presumption upon which plaintiff had the right to rely, that defendant had not, and would not let a deadly poison rest in pools in the travelled road without warning. To be notice, either actual or constructive, there must be the statement of some **fact**, which would lead to the apprehension of danger. "Now, plaintiff's witnesses, by word and act, show that nothing was said that there might be cyanide. Plaintiff's testimony show that no such statement could have been made. The act of watering the sheep speaks in no uncertain tones, that no such statement was made. There was no sign or warning or anything to induce plaintiff's witnesses to think or anticipate danger. The act of defendant was the grossest negligence, against which the defendant had the right to presume had not been done or committed. It seems to us, that upon principles of law and justice, this Court cannot and will not find contributory negligence.

V

But the Hon. District Court, quotes:

White vs. People R'W., 72 Atl. 1059.

But overlooks that that case is not in point, because it says, "Where he **knows** of the existence of danger, or **ought** to know of it, and with **such knowledge** voluntarily runs into the danger, etc."

Where and when did plaintiff **know**?.. From what

fact ought it to know? With what **knowledge** did it have?

Plaintiff did not **know**, and had no **knowledge**. This is not the case of crossing a railroad track, because a railway track is itself a sign of danger. Here there was no sign or anything to attract attention.

The learned Court also cites

Beinhorn vs Griswold, 69 Pac. 557.

But that case is not in point, because in that case, there was no inducement, invitation, allurement or attraction. The plaintiff's stock in that case were where they had no right to be. But in this case, here was a well travelled road, and the Hon. District Court says (Trans. p. 327) "The road has been used by the public generally, for a number of years" and on (p. 34 Transcript) the Court says, "It was the duty of defendant to take every reasonable precaution to prevent injury to those who were passing over the road." This duty in my opinion defendant failed to perform. Under all the circumstances in evidence, it is futile for defendant to plead ignorance of the fact that the road was in common use, or to urge that any one using it as a thoroughfare was in any sense a trespassor." It will be seen that the Court finds the **duty** of the defendant, and that plaintiff was **not a trespassor**. How then, can Beinhorn vs. Griswold *supra* be applicable, when the Court in that case makes it clear that in that case, the defendant owed **no duty** to the plaintiff and that plaintiff **was** a trespassor, and particularly distinguishes that case, from one like this. Now it will be seen that Hon. District Court, applies a rule of law not

applicable to the case at bar, and overlooks the true rule to be applied to contributory negligence, and fails to distinguish between wilfull and wanton and reckless negligence of defendant, or gross negligence, and mere negligence, and that defendant's negligence was continuous, and that contributory negligence cannot be used to excuse defendant for its wanton and reckless disregard of its plain duty, to the plaintiff and the public, and that the proximate cause is the continuous act of the defendant. Therefore we submit, the judgment should be reversed and judgment entered for plaintiff to the amount of its proven damages, towit: that is 1095 head (p. 199) at \$6.00 per head (p. 202) or \$6570.00. We have not taken each assignment of error separately, because all assignments cover practically the same questions.

Respectfully submitted,

Swaney & Marchessault
Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,

Appellant,

VS.

WILLIAM B. POLAND and FREDERICK WILLIAM
LOW,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Alaska, Division No. 3.

Filed

AUG 2 - 1913

F. D. Monckton,
Clerk.

No. 2621

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [2—3]

*In the District Court for the Territory of Alaska,
Division Number Three.*

No. 593.

UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK WILLIAM LOW,
Defendants.

Order Granting Leave to File Amended Complaint.

This cause coming on for hearing this day, on the application of the plaintiffs for leave to file the amended complaint tendered with said application, G. B. Brubaker, Assistant United States Attorney, appearing on behalf of the plaintiffs, and the defendants appearing by their attorney, S. O. Morford, Esq., good cause appearing therefore:

It is hereby ordered that plaintiffs be, and they are hereby, granted leave to file said amended complaint;

And it further ordered that the defendants have forty days from the date of the service of said amended complaint within which to answer the same.

Done in open court this 15th day of October, 1914.

FRED M. BROWN,
District Judge.

To which order defendant excepts and exception is allowed.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered: Court Journal S-1, page, 319. [4]

*In the District Court for the District of Alaska,
Division Number Three.*

IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK WILLIAM LOW,

Defendants.

Amended Complaint.

Come now the above-named plaintiffs, the United States of America, by and through William N. Spence, United States Attorney for the Third Division of the District of Alaska, acting under authority and by direction of the Attorney General of the United States, and for cause of action against the above-named defendants alleges:

I.

That heretofore, to wit, on or about the 6th day of September, 1905, the above-named defendant, William B. Poland, entered upon and took posses-

sion of the land hereinafter described, said land being then and there part of the public lands and public domain of the United States, with the purpose and intent of acquiring title thereto as the assignee of certain soldier's additional homestead entry rights, pursuant to Section 2306 of the Revised Statutes of the United States and Acts amendatory thereto, and caused an official survey thereof to be made, whereby said land was surveyed in the form of two tracts or parcels of land; that said land, entered and surveyed as aforesaid, is in the Kenai Recording Precinct, District of Alaska, and more particularly bounded and described as follows: [5]

United States Survey No. 241.

Beginning at corner No. 1 on the shore of Resurrection Bay, latitude sixty degrees, seven minutes north, longitude one hundred forty-nine degrees, seven minutes west, said point being marked by an iron pin three inches in diameter, marked "S. 241, cor. No. 1," thence south sixty-one degrees, thirty-seven minutes west two and sixty-one-hundredths chains; thence, south seventy-eight degrees, west nineteen and ten-hundredths chains; thence, south fifty-two degrees, fifteen minutes west ten chains; thence, south seventy-one degrees, fifty minutes west three chains; thence, south thirty-one degrees, twenty-seven minutes west three and twenty-hundredths chains to corner No. 2, which corner is marked by an iron pipe three inches in diameter, marked "S. 241 cor. No. 2," thence,

west six and fifty-nine-hundredths chains to corner No. 3, which corner is marked by an iron pipe three inches in diameter marked "S. 241 cor. No. 3," thence north forty-seven and eighty-eight-hundredths chains to corner No. 4, which corner is marked by an iron stake three inches in diameter marked "S. 241 cor. No. 4," thence, east forty chains to corner No. 5, which corner is marked by iron pipe three inches in diameter, marked "S. 241 cor. No. 5," thence south thirty-two and eighty-eight-hundredths chains to corner No. 1, the place of beginning, containing one hundred-fifty-nine and seventy-five-one-hundredths acres, being the land embraced in United States Survey No. 241, according to the official plat of said survey returned to the general land office by the Surveyor General, and;

United States Survey No. 242.

Beginning at corner No. 1 near the north shore of Resurrection Bay, identical with corner No. 5, U. S. Survey No. 241, an iron pipe three inches in diameter, marked S. 242, cor. No. 1; thence west 40 chains to corner No. 2, an iron pipe three inches in diameter, marked S. 242, cor. No. 2; thence north 40 chains to corner No. 3, an iron pipe three inches in diameter, marked S. 242, cor. No. 3; thence east 40 chains to corner No. 4, an iron pipe three inches in diameter marked S. 242, cor. No. 4; thence south 40 chains to corner No. 1, the place of beginning, containing one hundred and sixty acres, being

the land embraced within United States Survey No. 242, according to the official plat of said survey returned to the general land office by the Surveyor General.

That the land embraced within said survey constitutes and is a single body of land, containing 319.75 acres.

II.

That thereafter, to wit, on the 26th day of April, 1906, the said William B. Poland filed in the United States Land Office, at Juneau, Alaska, two applications [6] whereby he, as the assignee of certain soldier's additional homestead entry rights applied under Section 2306 of the Revised Statutes of the United States to enter the land above described, one of said applications covering the entry embraced in said Survey No. 241 and the other application covering the land embraced in said Survey No. 242.

III.

That thereafter, to wit, on the 20th day of January, 1908, the requisite proofs having been made, a patent for the land embraced in said Survey No. 241 was issued to the said William B. Poland, a copy of which patent is hereto attached, marked exhibit "A," and made a part hereof.

IV.

That, on the 30th day of July, 1906, the defendant, William B. Poland, filed or caused to be filed in the United States Land Office at Juneau, Alaska, in support of his said application for a patent to the land embraced in said Survey No. 242, an affidavit,

subscribed and sworn to by H. E. Revell and Frank Ballaine, which affidavit contained the following false statement:

Said tract of land (referring to the land embraced in said Survey No. 242) does not exceed 160 acres in extent and is in frontage less than 160 rods along the shore of any navigable water, and is more than eighty rods distant from any other survey or entry under the provisions of said Act of May 14th, 1898,

the Act referred to in said statement being Act of Congress entitled "An Act extending the homestead laws and providing for a right of way for railroads in the district of Alaska, and for other purposes," approved May 14, 1898, as amended by the Act of Congress entitled "An Act to amend [7] Section One of the Act of Congress approved May fourteenth, eighteen hundred and ninety-eight, entitled 'An Act extending the homestead laws and providing for a right of way for railroads in the district of Alaska,' " approved March 3, 1903.

That said statement was and is false in this, that said tract of land referred to in said affidavit was not more than eighty rods distant from any other survey or entry under the provisions of said Act of May 14th, 1898, as then amended, but was adjoining and contiguous to that certain tract of land embraced within said Survey No. 241, upon which a soldier's additional homestead entry and survey had been theretofore made by the said William B. Poland as hereinbefore set forth, and was part and parcel of

a single body of land containing more than one hundred and sixty acres, to wit, 319.75 acres, entered by soldier's additional homestead entry rights under said Act of May 14th, 1898, as amended, said single body of land being the land embraced within said Surveys No. 241 and No. 242.

That said statement was false and fraudulent in that it concealed from the officials of the Land Department of the United States the fact that land in excess of one hundred and sixty acres in a single body was entered by soldier's additional homestead right under the application of the said defendant, William B. Poland, in support of which application said affidavit was filed.

V.

That by means of said false affidavit filed as aforesaid, the said defendant, William B. Poland, knowingly, falsely and fraudulently, represented to plaintiffs and to the officials of the Land Department of the United States, whose duty it was to pass upon said application, that no land in excess of one hundred and sixty acres in a single [8] body in Alaska was entered and applied for by soldier's additional homestead rights under said application; whereas in truth and in fact land in excess of one hundred and sixty acres in a single body in Alaska was thereby entered and applied for under soldier's additional homestead rights, which fact the said defendant, William B. Poland, then and there well knew; that the said defendant, William B. Poland, caused said false affidavit to be filed as aforesaid and

said false and fraudulent representations to be made by means thereof, with the intent and for the purpose of deceiving said officials of the Land Department of the United States and leading them erroneously to believe that the land embraced within said Survey No. 242 was open and subject to entry and patent under soldier's additional homestead rights and to induce said officials to cause a patent to issue therefor, and with the further intent to defraud plaintiffs and unlawfully to deprive plaintiffs of the use and enjoyment of said land embraced in said Survey No. 242.

VI.

That the Assistant Commissioner of the General Land Office of the United States, relying upon the aforesaid false and fraudulent representations and believing them to be true and being induced thereby so to do, in the erroneous and mistaken belief that the land embraced within said Survey No. 242 was open and subject to entry and patent under soldier's additional homestead rights and that the defendant, William B. Poland, was lawfully entitled to a patent thereto, mistakenly, erroneously, without authority and in violation of law, and without jurisdiction so to do, approved said entry and application for a patent to the land embraced in said Survey No. 242; and thereafter, to wit, [9] on the 22d day of March, 1909, the President of the United States, likewise relying upon and being likewise deceived and induced by said false and fraudulent representations, under the same misapprehension as to the law and the facts, mistakenly, erroneously, without authority

and in violation of law, and without jurisdiction so to do, caused to be signed, executed and delivered to the said defendant, William B. Poland, a patent to the land embraced within said Survey No. 242, a copy of which patent is hereto attached, marked exhibit "B," and made a part hereof.

VII.

That Congress passed an Act approved March 3, 1903, entitled "An Act to amend Section One of the Act of Congress approved May 14, 1898, entitled 'An Act extending the homestead laws and providing for a right of way for railroads in the District of Alaska,' " which, among other things, provides that no more than one hundred and sixty acres shall be entered in any single body by soldier's additional homestead right.

That the land embraced within said Survey No. 242 was by the provision of the Act of Congress above mentioned reserved from entry and patent under soldier's additional homestead right by virtue of the soldier's additional homestead entry theretofore made by the said defendant, William B. Poland, upon the land embraced within said Survey No. 241; that by force of the foregoing, the patent issued to the said defendant, William B. Poland, for the land embraced within said Survey No. 242 was and is null and void for the reason that more than one hundred and sixty acres of land in a [10] single body entered by soldier's additional homestead rights was thereby attempted to be granted to the defendant, William B. Poland.

VIII.

That thereafter, to wit, on the 25th day of May, 1909, the said William B. Poland made, executed and delivered to the above-named defendant, Frederick William Low, a deed, wherein and whereby he conveyed, bargained, sold and confirmed unto the said Frederick William Low, and to his heirs and assigns forever, the land hereinbefore described, and covenanting to and with the said Low to warrant and defend the same against any and all persons claiming or to claim title thereto; a copy of which deed is hereto attached, marked exhibit "C," and made a part hereof.

IX.

That the land embraced within said Survey No. 242 during all the times hereinbefore mentioned was and now is public land and part of the public domain of the United States and the said United States have been at all times, and now are, entitled to the immediate possession thereof; that the afore-said patent to the land embraced within said Survey No. 242 and the deed hereinbefore mentioned, in so far as said deed refers to the land embraced within said Survey No. 242 are, and each of them is, a cloud upon plaintiffs' title to said land.

X.

That plaintiffs have no plain, speedy or adequate remedy at law.

WHEREFORE, plaintiffs pray that said patent for the land embraced within said Survey No. 242 be vacated, cancelled and declared to be null and

void, and that said [11] deed from the defendant William B. Poland to Frederick William Low, in so far as the same refers to the land embraced within said Survey No. 242, be vacated, cancelled, and declared to be null and void; that plaintiffs have and recover from the defendants their costs and disbursements herein and for such further relief as to the Court may seem just and equitable in the premises.

WILLIAM N. SPENCE,

United States Attorney for the Third Division of
the District of Alaska.

GUY B. BRUBAKER,

Assistant United States Atty.

United States of America,

District of Alaska,

Third Division,—ss.

Guy B. Brubaker, being first duly sworn, upon oath, deposes and says: That he is the Assistant United States Attorney for the Third Division, Territory of Alaska, and attorney for the plaintiffs in the foregoing cause; that he makes this verification for and on behalf of said plaintiffs; that the foregoing amended complaint is signed by him in his own proper handwriting; that he has read the same; has knowledge of all the material allegations therein set forth, and that he believes the same to be true.

G. B. BRUBAKER.

Subscribed and sworn to before me this 15 day of
October, *September*, 1914.

[Seal]

WM. H. WHITTLESEY,

Notary Public for Alaska.

Filed in the District Court, Territory of Alaska,
Third Division. Oct. 15, 1914. Arthur Lang, Clerk.
By T. P. Geraghty, Deputy. [12]

Exhibit "A" [to Amended Complaint].

THE UNITED STATES OF AMERICA,

To all to whom these presents shall come, Greeting:
Homestead Certificate No. 80.

Application 80.

Whereas, there has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Juneau, Alaska, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, including the Act of March 3, 1891 (26 Statutes 1099), and the Act of May 14, 1898 (30 Statutes, 409), the claim of William B. Poland, assignee of William F. Isbell and Edward McArdle, has been established and duly consummated in conformity to law, for the lands embraced in U. S. Survey No. 241, situated on the shore of Resurrection Bay, Alaska, more particularly bounded and described as follows, with magnetic variation twenty-seven degrees, two minutes east:

Beginning at corner No. 1 on the shore of Resurrection Bay, latitude sixty degrees, seven minutes north, longitude one hundred forty-nine degrees, seven minutes west, said point being marked by an iron pin three inches in diameter, marked "S. 241, cor. No. 1," thence, south sixty-one degrees, thirty-

seven minutes west two and sixty-one hundredths chains; thence, south seventy-eight degrees, west nineteen and ten-hundredths chains; thence, south fifty-two degrees, fifteen minutes west ten chains; thence, south seventy-one degrees, fifty minutes west three chains; thence, south thirty-one degrees, twenty-seven minutes west three and twenty-hundredths chains to corner No. 2, which corner is marked by an iron pipe three inches in diameter, marked "S. 241 cor. No. 2," thence, west six and fifty-nine-hundredths chains to corner No. 3, which corner is marked by iron pipe three inches in diameter, marked "S. 241 cor. No. 3"; thence, north forty-seven and eighty-eight hundredths chains to corner No. 4, which corner is marked by an iron stake three inches in diameter, marked "S. 241 cor. No. 4"; thence east forty chains to corner No. 5, which corner is marked by iron pipe three inches in diameter, marked "S. 241 cor. No. 5," thence south thirty-two and eighty-eight-hundredths chains to corner No. 1, the place of beginning, containing one hundred fifty-nine and seventy-five-hundredths acres;

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAVE GIVEN AND GRANTED, and by these presents DO GIVE AND GRANT, unto the said William B. Poland, and to his heirs, the lands above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature hereunto belonging, unto the said William B. Poland and to his heirs and assigns forever. And there is reserved,

from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States and a roadway sixty feet in width parallel to the shore line as near as may be practicable [13] shall be reserved for the use of the public as a highway. And reserving to the United States the right to regulate the taking of salmon and to do all things necessary to protect and prevent the destruction of salmon in all waters of the lands hereby granted, and ingress and egress are reserved to the public on the waters of all streams, whether navigable or otherwise.

IN TESTIMONY WHEREOF, I Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the twentieth day of January, in the year of our Lord one thousand nine hundred and eight and of the Independence of the United States the one hundred and thirty-second.

By the President,

THEODORE ROOSEVELT.

By H. W. SANFORD,

Recorder of the General Land Office. [14]

Exhibit "B" [to Amended Complaint].**THE UNITED STATES OF AMERICA.**

To all to whom these presents shall come, greeting.
Juneau 0289.

Homestead Certificate No.

Application.

WHEREAS, There has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Juneau, Alaska, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of William B. Poland, Assignee of Harold M. Fay, minor orphan child of Clinton B. Fay by Ida L. Fay, guardian, and Wyllis S. Walkley, has been established and duly consummated, in conformity to law, for the lands embraced in U. S. Survey No. 242, more particularly bounded and described as follows; Beginning at corner No. 1, near the north shore of Resurrection Bay, identical with corner No. 5, U. S. Survey No. 241, an iron pipe three inches in diameter, marked S. 242, cor. No. 1; thence west forty chains to corner No. 2, an iron pipe three inches in diameter, marked S. 242, cor. No. 2, thence north forty chains to corner No. 3, an iron pipe three inches in diameter marked S. 242, cor. No. 3, thence east 40 chains to corner No. 4, an iron pipe three inches in diameter marked S. 242, cor. No. 4, thence south 40 chains to corner No. 1, the place of beginning, in the District of Alaska, containing one hundred sixty

acres, according to the Official Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor General.

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said William B. Poland the tract of land above described; TO HAVE AND TO HOLD the said tract of land, with the appurtenances thereof, unto the said William B. Poland and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the twenty-second day of March in the year of our Lord one thousand nine hundred and nine, and of

the Independence of the United States the one hundred and thirty-third.

By the President,

[Seal]

WM. H. TAFT.

By M. W. YOUNG,

Secretary.

H. W. SANFORD,

Recorder of the General Land Office. [15]

Demurrer [of William B. Poland et al. to Amended Complaint].

This indenture, made this 25th day of May, A. D. 1909, between Wm. B. Poland, a bachelor, by Francis H. Stewart, his attorney in fact under power of attorney, the party of the first part, and Frederick William Low, of the City of Seattle, County of King, and State of Washington, party of the second part:

Witnesseth: That the said party of the first part, for and in consideration of the sum of One (\$1.00) Dollar, gold coin of the United States of America, to him in hand paid by the said party of the second part and other good and valuable considerations, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns that parcel or parcels of land situated and being at the head of Resurrection Bay, in the Territory of Alaska, covered by United States official surveys No. 241 and 242 and patents from the United States Government for same, described as follows, with magnetic variation twenty-seven degrees and two minutes East, U. S. Survey No. 241;

Beginning at corner No. 1 on the shore of Resurrection Bay, latitude sixty degrees, seven minutes north, longitude one hundred forty-nine degrees seven minutes west, said point being marked by an iron pin three inches in diameter, marked "S. 241, cor. No. 1; thence, south sixty-one degrees, thirty-seven minutes west two and sixty-one hundredths chains; thence, south seventy-eight degrees, west nineteen and ten hundredths chains; thence, south fifty-two degrees, fifteen minutes west ten chains; thence, south seventy-one degrees, fifty minutes west three chains; thence south; thence thirty-one degrees, twenty-seven minutes west three and twenty-hundredths chains to corner No. 2, which corner is marked by an iron pipe three inches in diameter, marked "S. 241 cor. No. 2," thence west six and fifty-nine-hundredths chains to cor. No. 3, which corner is marked by iron pipe three inches in diameter, marked "S. 241, cor. No. 3"; thence, north forty-seven and eighty-eight hundredths chains to corner No. 4, which corner is marked by an iron stake three inches in diameter, marked "S. 241, cor. No. 4"; thence, east forty chains to corner No. 5, which corner is marked by iron pipe three inches in diameter, marked "S. 241, cor. No. 5"; thence, south thirty-two and eighty-eight hundredths chains to corner No. 1, the place of beginning, containing one hundred fifty-nine and seventy-five-hundredths acres;

Also the lands embraced in U. S. Survey No. 242, magnetic variation twenty-seven degrees and two

minutes east, beginning at corner No. 1 near the north shore of Resurrection Bay, which corner is identical with corner No. 5, U. S. Survey No. 241, said corner being marked by iron pipe three inches in diameter marked "S. 242, cor. No. 1," west 40.00 chains to corner No. 2, said corner being marked by iron pipe three inches in diameter marked "S. 242, cor. No. 2"; thence north 40.00 chains to corner No. 3, said corner being marked by iron pipe three inches in diameter marked "S. 242, cor. No. 3"; thence east 40.00 chains to corner No. 4, said corner being marked by iron pipe three inches in diameter marked "S. 242 cor. No. 4"; thence south 40.00 chains to corner No. 1, the place of beginning, containing one hundred and sixty acres. [16]

Together, with the appurtenances, to have and to hold the said premises with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

And the said party of the first part, his heirs, executors and administrators, does by these presents, covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that he, the said party of the first part, his heirs, executors and administrators, all and singular, the premises hereinabove conveyed, described and granted or mentioned, with the appurtenances, unto the said party of the second part, his heirs and assigns, and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will warrant and forever defend.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

WILLIAM B. POLAND. (Seal.)

By FRANCIS H. STEWART, (Seal)

His Attorney in Fact.

Signed, sealed and delivered in presence of

G. S. SCHOFIELD,

GEORGE P. BAGG.

State of New York,

County of New York,—ss.

This is to certify, that on this 25th day of May, A. D. 1909, before me, the undersigned, a notary public in and for the County of New York, and State of New York, duly commissioned and sworn, personally came Francis H. Stewart to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed as the agent and Attorney in Fact for and on behalf of William B. Poland, Bachelor, and for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

LETITIA M. HODGINS,

Notary Public in and for New York County, New York.

State of New York,

County of New York,—ss.

I, Peter J. Dooling, Clerk of the County of New York, and also Clerk of the Supreme Court for the

said county, the same being a court of record, do hereby certify that Letitia M. Hodgins, whose name is subscribed to the certificate of the proof or the acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof or acknowledgment, a Notary Public in and for the County of New York, dwelling in the said county, commissioned and sworn, and duly authorized to take the same. And further that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court and county, the 28th day of May, 1909.

[Seal]

PETER J. DOOLING,

Clerk.

The foregoing instrument filed for record Nov. 18, 1909, at 11 A. M. by request S. O. Morford.

J. J. FINNEGAN,

District Recorder. C. [17]

Due service of the foregoing amended complaint is hereby acknowledged.

At Seward, Alaska, this 15th day of October, 1914.

S. O. MORFORD,

Attorney for Defendants. [18]

*In the District Court for the Territory of Alaska,
Third Division.*

#593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM B. POLAND and FREDERICK WILL-
IAM LOW,

Defendants.

Demurrer.

Come now the defendants, William B. Poland and Frederick William Low, by their attorney, and demur to plaintiff's amended complaint on file herein, and for cause of demurrer state;

That said amended complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them, either in law or equity.

S. O. MORFORD,

Attorney for Defendants.

Service of copy accepted this 24 day of November,
A. D. 1914.

WM. H. WHITTLESEY,

Asst. U. S. Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 23, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [19]

*In the District Court for the District of Alaska,
Division Number Three.*

No. 593.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK WILLIAM LOW,

Defendants.

**Demurrer of Defendant Frederick William Low
[to Amended Complaint].**

Comes now Frederick William Low, one of the defendants above named, by his attorneys, Ira Bronson and S. O. Morford, and demurs to the amended complaint of the plaintiff herein on the ground that said complaint does not state facts sufficient to constitute a cause of action or to entitle the plaintiffs to any relief in equity against this defendant.

S. O. MORFORD and

IRA BRONSON,

Attorneys for Defendant,

Frederick William Low.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 19, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [20]

*In the District Court for the District of Alaska,
Division Number Three.*

No. 593.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK WILL-
IAM LOW,

Defendants.

**Demurrer of Defendant, William P. Poland [to
Amended Complaint].**

Comes now William B. Poland, one of the defend-
ants above named, by his attorneys, S. O. Morford
and Ira Bronson, and demures to plaintiffs amended
complaint on the ground that it does not state facts
sufficient to constitute a cause of action at law or
to entitle plaintiffs to relief in equity against this
defendant and upon the further ground that it ap-
pears from the face of the complaint that this defend-
ant is not a party to this action.

S. O. MORFORD and

IRA BRONSON,

Attorneys for Defendant,

William B. Poland.

[Endorsed]: Filed in the District Court, Territory
of Alaska, Third Division. Feb. 19, 1915. Arthur
Lang, Clerk. By T. P. Geraghty, Deputy. [21]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM B. POLAND and FREDERICK WILLIAM LOW,

Defendants.

Decision on Demurrer [to Amended Complaint].

On January 20, 1908, a patent for a fraction less than 160 acres of land, situate on the shore of Resurrection Bay, near Seward, Alaska, and designated as U. S. Survey #241, was issued to the defendant Poland, under S. A. H. right. On the 22d day of March, 1909, a second patent was issued to said defendant Poland for 160 acres of land embraced within U. S. Survey #242, which adjoins the said survey #241, on the northerly side; applications for patent to both of said surveys #241 and 242 having been made on the 26th day of April, 1906, in the U. S. Land Office at Juneau, Alaska.

The plaintiff brings this action to cancel the patent for the land embraced in said survey #242 for the reason that it is in violation of the terms of an Act of Congress, approved March 3, 1903 (Sec. 101, Compiled Laws of Alaska), which provides that "no more than 160 acres shall be entered in "any single body" by such scrip, lieu selection, or soldier's

additional homestead right," plaintiff's contention being that the said two surveys being contiguous constitute a "single body" within the meaning of said law.

Plaintiff's complaint alleges that the Assistant Commissioner of the General Land Office, under the erroneous and mistaken belief that the laws gave said Poland a right to said land and that he was entitled under the law to receive patent therefor, mistakenly and erroneously, without authority, and in violation of law, and without jurisdiction so to do, approved the entry and application of the said Poland for the land embraced within said Survey #242. [22]

The complaint further alleges that Poland filed or caused to be filed in the United States Land Office at Juneau, Alaska—

"in support of his said application for a patent to the land embraced in said Survey #242, an affidavit, subscribed and sworn to by H. E. Revell and Frank Ballaine, which affidavit contained the following false statement:

Said tract of land (referring to the land embraced in said Survey #242) does not exceed 160 acres in extent and is in frontage less than 160 rods along the shore of any navigable water, and is more than eighty rods distant from any other survey or entry under the provisions of said Act of May 14, 1898, the Act referred to in said statement being the Act of Congress entitled "An Act extending the homestead laws and providing for a right of

way for railroads in the District of Alaska, and for other purposes" approved May 14, 1898, as amended by the Act of Congress entitled "An Act to amend Section One of the Act of Congress approved May fourteenth, eighteen hundred and ninety-eight, entitled 'An Act extending the homestead laws and providing for a right of way for railroads in the district of Alaska' approved March 3, 1903."

I know of no law requiring one location or survey under said Act to be distant eighty rods from any other survey or entry made under the provisions of the said Act. Said Act does provide that "along the shore of any navigable water a space of at least 80 rods shall be reserved from entry between all such claims." But Survey #242 is not along the shore of any navigable water, but is on the northerly or landward side of said Survey #241, which is along the shore of Resurrection Bay. If one location or entry under said Act was required to be eighty rods distant from another survey or entry under the provisions of the same act, it would lead to a manifest absurdity, in that each location or survey would stand alone surrounded by vacant lands on each side and corner, a distance of eighty rods in each direction.

The United States Attorney contends that the intent of Congress in enacting this law was to restrict one individual from acquiring title to more than 160 acres, even by separate locations and entries if the same be contiguous, but the Act does not say so; it simply says that not more than 160 acres shall be *entered* in "any single body." The words "locate"

and "enter" are practically synonymous, each being a step or proceeding in the matter of acquiring title from the United States to public lands.

The United States mining laws for many years have provided that [23] no location of a placer claim shall exceed 160 acres for any one person or association of persons (Sec. 2330, Rev. Stats.), but it has never been claimed that this restricted the same person or association of persons from making two locations immediately adjoining. The same reasoning would apply to one case as to the other, but in this case, if Congress intended to restrict an individual from locating or acquiring title to more than one 160 acre tract of land, it would have been very easy to have expressed that intent. It seems to me that it would violate all rules of statutory construction if we should read into said Act something which was not expressed in it. The language is plain, clear and complete and does not require any forced construction to ascertain its meaning or intent.

Congress, wherever it has sought to restrict the right of an individual to more than one claim or to a certain number of acres, has always expressly provided such restriction; for instance in limiting an individual to one homestead, or one pre-emption claim, or other claims upon the public domain of the United States. The only limitation sought to be made upon the number of claims which can be located in Alaska, was by an Act of Congress, approved August 1, 1912, Sec. 129-C, Comp. Laws of Alaska, which provides that—

“no person shall thereafter locate, cause or procure to be located, for himself, more than two placer mining claims in any calendar month, provided that one or both of such locations may be included within an association claim.”

It might be argued that it is a useless thing to provide that no more than 160 acres of land shall be entered in one single body under said Act of March 3, 1903, if two such locations or claims could be entered or patented and they adjoined each other, but this is exactly what has been done for nearly fifty years, in another class of public land entries.

In the case of Placer mining claims, of 160 acres, it might just as well be asked, why should a claim or location be limited to 160 acres, when two or more of such locations may be entered by the same locators when they adjoin, and virtually constitute one body, tract or area greatly in excess of the amount limited to a single location? The answer probably is that a limitation must be made [24] somewhere, otherwise one locator could locate the whole country, and it was probably placed at 160 acres as being a reasonable area to be included in one location, the presumption being that the additional expense of locating, surveying and other expenses attendant upon holding and patenting the ground will operate as a check on excessive locating or patenting by one individual or association.

In a recent case in the U. S. District Court for the Western District of Washington, *Shenk vs. Aumiller*, 217 Fed. Rep. 969, the Court says:

“Reference to the act of August 30, 1890, shows that Congress excluded from entry or settlement ‘*under any of the land laws * * more than 320 acres in the aggregate under all of said laws.*’ This includes every classification. In the construction subsequently placed upon this act Congress referred to only two classifications of land: (a) Agricultural lands; and (b) mineral lands. The primary and general rule of statutory construction is that the intent of the lawmaker must be ascertained, when the language employed is involved and the intent not clearly expressed. The purpose for which the act under consideration is enacted being a matter of first importance in arriving at the solution of the question presented, I think it is proper for the Court to consider that the conditions of the United States with relation to increase of population were greatly changed in 1890 from the conditions existing at the dates of the enactment of the various public land *lands*, and that the spirit of the administration of the public land laws was to benefit the many and not the few. It is common knowledge that in 1890 the public land area open to settlement was becoming very limited. It appears that Congress adopted a new policy by limiting the number of acres to be entered by a person ‘*under any of the land laws*’ and ‘*under all of the laws.*’ ”

Reasoning from like considerations in this case it may be said that conditions in Alaska are very dis-

similar from what they are in the States of the Union, and that the Congress of the United States recognized this by fixing 320 acres as the amount which could be taken in a homestead in Alaska. There is little or no danger of monopolization of the nonmineral lands of Alaska by an excessive number of entries being made by one locator. There was some such tendency in the matter of locating mining claims, which was sought to be checked by the act of August 1, 1912, above referred to. The only likelihood of any monopoly is along the shore line of navigable waters and this is sufficiently guarded against by the provisions in said [25] Act of March 3, 1903, reserving eighty acres along the shore of navigable waters between entries made under such act.

I do not see where there is any fraud on the part of the defendant Poland in entering the two said separate tracts of land under said act, even though the same adjoined each other, and the demurrer will have to be sustained.

Done at Valdez, Alaska, this 23d day of March, 1915.

FRED M. BROWN,

District Judge.

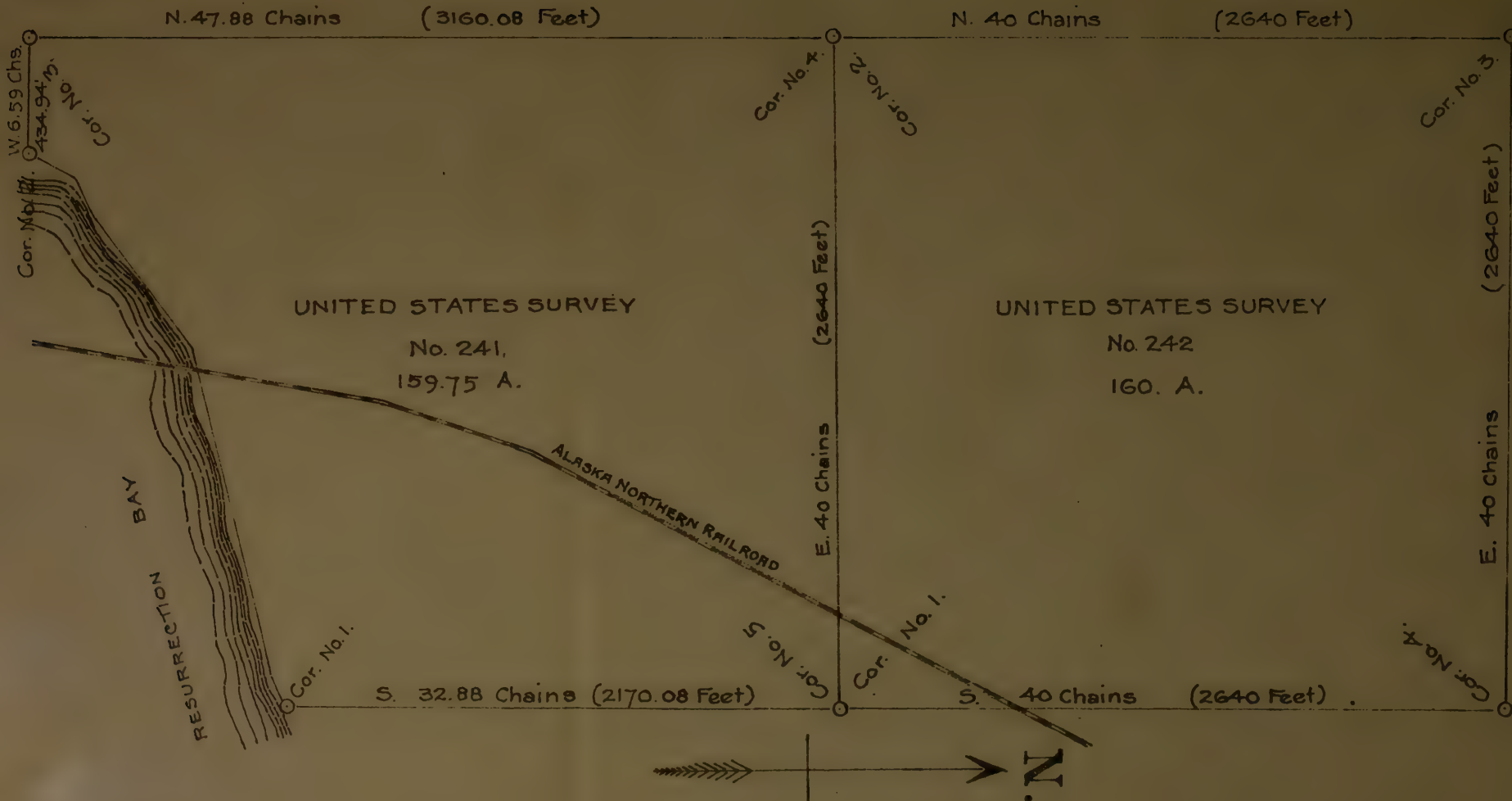
Entered Court Journal No. 9, page No. 30.

Filed in the District Court, Territory of Alaska, Third Division. Mar. 23, 1915. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [26]

FILED in the District Court,
Territory of Alaska, Third Division.

MAR 24 1915

ARTHUR LANG, Clerk
Charles W. Hunt Deputy



*In the District Court for the Territory of Alaska,
Division Number Three.*

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK WILLIAM LOW,

Defendants.

Application and Motion for Leave to File Affidavits Showing Value of Subject Matter in Controversy.

Comes now the plaintiffs and make application to the Court for leave to file the affidavits of J. H. Romig, Edmund Rudolph, and F. B. Wood, showing the amount involved and the value of the subject matter in controversy in the above-entitled cause, which affidavits are tendered herewith.

WILLIAM N. SPENCE,

United States Attorney.

Due service of the foregoing motion and application hereby acknowledged in Seward, Territory of Alaska, Third Judicial Division, by receiving a true copy thereof certified as such by William A. Munly, Assistant United States Attorney.

This 13th day of April, 1915.

S. O. MORFORD,

Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Apr. 15, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [28]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 593.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK WILLIAM LOW,

Defendants.

**Order Allowing Filing of Affidavits Showing Value
of Subject Matter in Controversy.**

This matter coming on for a hearing upon the motion and application for leave to file the affidavits of J. H. Romig, F. B. Wood and Edmund Rudolph, showing the amount involved and the value of the subject matter in controversy in the above-entitled suit, the plaintiffs appearing by William N. Spence, United States Attorney, and the defendants by S. O. Morford, attorney for said defendants, and after argument and the Court being advised in the premises, said motion and application is allowed.

It is therefore ordered that the affidavits of said J. H. Romig, F. B. Wood, and Edmund Rudolph, showing the amount involved and the value of the subject matter in controversy in the above-entitled suit be allowed to be filed herein, and the same are hereby

made a part of the record in the above-entitled suit.

Done in open court this tenth day of May, 1914.

FRED M. BROWN,

District Judge.

To which defendant excepts and exception is allowed.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 10, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 118. [29]

**[Affidavit of Edmund Rudolph, Re Value of Subject
Matter in Controversy.]**

*In the District Court for the Territory of Alaska,
Division Number Three.*

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK WILLIAM LOW,

Defendants.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Edmund Rudolph, being first duly sworn, depose and say: I am a resident of the Town of Seward, in the Territory of Alaska; that I am acquainted with the value of the following described real property

situate in the Territory of Alaska, in the Seward Recording District, to wit:

Beginning at corner No. 1 near the north shore of Resurrection Bay, identical with corner No. 5, U. S. Survey No. 241, an iron pipe three inches in diameter, marked S. 242, cor. No. 1; thence west 40 chains to corner No. 2, an iron pipe three inches in diameter, marked S. 242, cor. No. 2, thence north 40 chains to corner No. 3, an iron pipe three inches in diameter, marked S. 242, cor. No. 3; thence east 40 chains to corner No. 4, an iron pipe three inches in diameter marked S. 242, cor. No. 4; thence south 40 chains to corner No. 1, the place of beginning, containing one hundred and sixty acres, being the land embraced within United States Survey No. 242, according to the official plat of said survey returned to the general land office by the Surveyor General.

That said property is the same property that is involved in the above-entitled suit brought by the United States against the defendants for the purpose of canceling a patent to said land. That said land is situate a short distance from said Town of Seward, Alaska.

That the value of said land as above described and in controversy in said suit is Five Thousand dollars.

EDMUND RUDOLPH. [30]

Subscribed and sworn to before me this 3d day of April, 1915.

[Seal]

WM. H. WHITTLESEY,

Notary Public for the Territory of Alaska.

My commission expires Nov. 30th, 1917.

United States of America,

Territory of Alaska,

Third Judicial Division,—ss.

I, William H. Whittlesey, being first duly sworn, depose and say: That I am a citizen of the United States, over the age of twenty-one years and qualified to be a witness in this case; that I did on the 6th day of April, 1915, at Seward, Alaska, serve the foregoing affidavit upon S. O. Morford, Esq., Attorney for defendants herein, by delivering to and leaving with him, personally, a certified copy thereof.

WILLIAM H. WHITTLESEY.

Subscribed and sworn to before me this 6th day of April, 1915.

[Seal]

CURTIS R. MORFORD,

Notary Public for Alaska.

My commission expires Oct. 8, 1915.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Apr. 15, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [31]

**[Affidavit of F. B. Wood, Re Value of Subject Matter
in Controversy.]**

*In the District Court for the Territory of Alaska,
Division Number Three.*

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK WILL-
IAM LOW,

Defendants.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, F. B. Wood, being first duly sworn, depose and say: I am a resident of the Town of Seward, in the Territory of Alaska; that I am acquainted with the value of the following described real property situate in the Territory of Alaska, in the Seward Recording District, to wit:

Beginning at corner No. 1 near the north shore of Resurrection Bay, identical with corner No. 5, U. S. Survey No. 241, an iron pipe three inches in diameter, marked S. 242, cor. No. 1; thence west 40 chains to corner No. 2, an iron pipe three inches in diameter, marked S. 242, cor. No. 2, thence north 40 chains to corner No. 3, an iron pipe three inches in diameter, marked S. 242, cor. No. 3; thence east 40 chains to corner No. 4, an iron pipe three inches in

diameter marked S. 242, cor. No. 4; thence south 40 chains to corner No. 1, the place of beginning, containing one hundred and sixty acres, being the land embraced within United States Survey No. 242, according to the official plat of said survey returned to the general land office by the Surveyor General.

That said property is the same property that is involved in the above-entitled suit brought by the United States against the defendants for the purpose of canceling a patent to said land. That said land is situate a short distance from said Town of Seward, Alaska.

That the value of said land as above described and in controversy in said suit is Five Thousand Dollars.

F. B. WOOD. [32]

Subscribed and sworn to before me this 3d day of April, 1915.

[Seal]

WM. H. WHITTLESEY,

Notary Public for Alaska.

My commission expires Nov. 30, 1917.

Due service of the foregoing affidavit is hereby acknowledged in Seward, Territory of Alaska, Third Division, by receiving a copy thereof, certified as such by William H. Whittlesey, Assistant United States Attorney.

This — day of April, 1915.

Attorney for Defendants.

United States of America,
Territory of Alaska,
Third Judicial Division,—ss.

I, William H. Whittlesey, being first duly sworn, depose and say: That I am a citizen of the United States, over the age of twenty-one years and qualified to be a witness in this case; that I did on the 6th day of April, 1915, at Seward, Alaska, serve the foregoing affidavit upon S. O. Morford, Esq., Attorney for Defendants herein, by delivering to and leaving with him, personally, a certified copy thereof.

WILLIAM H. WHITTLESEY.

Subscribed and sworn to before me this 6th day of April, 1915.

[Seal]

CURTIS R. MORFORD,
Notary Public for Alaska.

My commission expires Oct. 9, 1915.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Apr. 15, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [33]

[Affidavit of J. H. Romig, Re Value of Subject
Matter in Controversy.]

*In the District Court for the Territory of Alaska,
Division Number Three.*

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK WILL-
IAM LOW,

Defendants.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, J. H. Romig, being first duly sworn, depose and say: I am a resident of the Town of Seward, in the Territory of Alaska; that I am acquainted with the value of the following described real property situate in the Territory of Alaska, in the Seward Recording District, to wit:

Beginning at corner No. 1 near the north shore of Resurrection Bay, identical with corner No. 5, U. S. Survey No. 241, an iron pipe three inches in diameter, marked S. 242, cor. No. 1; thence west 40 chains to corner No. 2, an iron pipe three inches in diameter, marked S. 242, cor. No. 2; thence north 40 chains to corner No. 3, an iron pipe three inches in diameter, marked S. 242, cor. No. 3; thence east 40 chains to corner No. 4, an iron pipe three inches in

diameter marked S. 242, cor. No. 4; thence south 40 chains to corner No. 1, the place of beginning, containing one hundred and sixty acres, being the land embraced within United States Survey No. 242, according to the official plat of said survey returned to the general land office by the Surveyor General.

That said property is the same property that is involved in the above-entitled suit brought by the United States against the defendants for the purpose of canceling a patent to said land. That said land is situate a short distance from said Town of Seward, Alaska.

That the value of said land as above described and in controversy in said suit is Three Thousand and 00/100 Dollars.

J. H. ROMIG. [34]

Subscribed and sworn to before me this 3d day of April, 1915.

[Seal]

WM. H. WHITTLESEY,

Notary Public for the Territory of Alaska.

My commission expires Nov. 30, 1917.

United States of America,

Territory of Alaska,

Third Judicial Division,—ss.

I, William H. Whittlesey, being first duly sworn, depose and say: That I am a citizen of the United States, over the age of twenty-one years and qualified to be a witness in this case; that I did on the 6th day of April, 1915, at Seward, Alaska, serve the foregoing affidavit upon S. O. Morford, Esq., Attor-

ney for Defendants herein, by delivering to and leaving with him, personally, a certified copy thereof.

WILLIAM H. WHITTLESEY,

Subscribed and sworn to before me this 6th day of April, 1915.

CURTIS R. MORFORD,

Notary Public for Alaska.

My commission expires Oct. 9, 1915.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Apr. 15, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [35]

[Order of Dismissal.]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM B. POLAND and FREDERICK WILLIAM LOW,

Defendants.

ORDER ON DEMURRER.

This cause coming on regularly to be heard upon demurrer of defendant to plaintiff's complaint, on the 23d day of March, 1915, plaintiff being represented by William N. Spence and Guy Brubecker, United States attorneys, and defendant being represented by S. O. Morford, Esq., and the Court hav-

ing heard the arguments of respective counsel, and being fully advised in the premises, rendered its decision in writing sustaining defendant's demurrer to plaintiff's complaint in all points therein, and the plaintiff declining to plead further.

It is hereby ordered, adjudged and decreed, that plaintiff's action be and hereby is dismissed.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 29, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered in Court Journal No. 9, page No. 155. [36]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 593.

UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK
WILLIAM LOW,

Defendants.

Amended Decree.

This cause coming on to be heard upon motion of the defendants to amend the decree heretofore entered herein, on the 29 day of May, 1915, by dismissing the complaint and complaint as amended and the plaintiffs' action as to both of said defendants, and it appearing to the Court that in the decree here-

tofore entered herein as aforesaid, said decree applied to defendant instead of defendants, and it appearing that said error was made through inadvertence and mistake said motion to amend said decree is allowed;

It is therefore ordered, adjudged and decreed that the demurrer of the defendants and of each of said defendants to the plaintiffs' amended complaint be and the same is hereby sustained and the plaintiffs' complaint and amended complaint and the plaintiffs' said action be and the same are hereby dismissed.

Done in open court this 21st day of June, 1915.

FRED M. BROWN,

District Judge.

Filed in the District Court, Territory of Alaska, Third Division, June 21, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 166. [37]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 593.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK
WILLIAM LOW,

Defendants.

Petition for Appeal.

To the Honorable, the Judge of the Above-entitled Court.

The above-named plaintiffs the United States of America, by and through William N. Spence, United States Attorney for the Third Division of the District of Alaska, acting under and by the direction of the Attorney General of the United States of America, conceiving themselves aggrieved by the order and decree made and entered in the above-named cause, on the 29 day of May, 1915, which order and decree was amended by the above-entitled court on the 21 day of June, 1915, wherein and whereby it was ordered, adjudged and decreed that the demurrers of the defendants and each of them to the amended complaint of the plaintiffs be sustained and that said plaintiffs' complaint, amended complaint, and action be and were dismissed, do hereby appeal from the said order and decree and amended decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors filed herein, and said plaintiffs pray that this appeal be allowed and that a transcript of the record, papers, and proceedings upon which the said order and decrees were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM N. SPENCE,

United States Attorney.

Dated this 22d day of June, 1915.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 2, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [38]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 593.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK
WILLIAM LOW,

Defendants.

Order Allowing Appeal.

Now, on this day come the plaintiffs the United States of America, by William N. Spence, United States Attorney for the above-entitled district, acting under and by the direction of the Attorney General of the United States of America, and present to the Court, its petition praying for an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order and decree of the above-entitled court made and entered herein on the 29 day of May, 1915, which order and decree was amended by the above-entitled court on June 21, 1915, ordering and decreeing that the demurrers of the defendants and the demurrer of each of said defendants to the amended complaint of the plaintiffs filed herein, be sustained and that the complaint, amended complaint, and action of the plain-

tiffs be dismissed and said plaintiffs also present a bond on said appeal with sufficient sureties in the sum of One Thousand Dollars (\$1000).

Whereupon it is ordered that the prayer of said petition be granted and that said plaintiffs the United States of America be and they are hereby allowed to take the appeal prayed for in said petition and that said bond presented by said plaintiffs be and the same is hereby approved.

Done in open court this 22d day of June, 1915.

FRED M. BROWN,

Judge of the Above-entitled Court.

[Endorsed]: Filed in the District Court, Ter. of Alaska, Third Div. June 22, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

[Endorsed]: Entered Court Journal No. 9, page 170. [39]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 593.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK
WILLIAM LOW,

Defendants.

Assignment of Errors.

Come now on this — day of June, 1915, the plaintiffs in the above-entitled cause and file the following assignment of errors which they will rely upon their

appeal from the order and decree made by this Honorable Court on the 29 day of May, 1915, which order and decree was amended on the 21 day of June, 1915, in the above-entitled cause.

I.

The Court erred in sustaining the demurrers of the defendants and the demurrer of each of said defendants to the plaintiffs' amended complaint.

II.

The Court erred in not overruling the said demurrers of the defendants and the demurrer of each of said defendants to said amended complaint of plaintiff.

III.

The Court erred in sustaining the demurrers of the defendants and the demurrer of each of said defendants to the complaint of the plaintiffs as amended.

IV.

The Court erred in not overruling said demurrers of the defendants and the demurrer of each of said defendants to the plaintiffs' complaint as amended.
[40]

V.

The Court erred in entering the decree and amended decree herein sustaining said demurrers of the defendants and the demurrer of each of said defendants to said amended complaint of the plaintiffs, and dismissing the action of the plaintiffs herein.

VI.

The Court erred in not overruling said demurrers of the defendants and the demurrer of each of said defendants to said amended complaint of the plain-

tiffs and in not requiring said defendants and each of them to answer said complaint as amended.

Wherefore, said plaintiffs pray the Court that said order and decree of the above-entitled court and said order and decree as amended as aforesaid may be reversed and that said court may be directed to enter a decree as set forth in the amended complaint of the plaintiffs.

WILLIAM N. SPENCE,
United States Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 22, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [41]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 593.

UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK
WILLIAM LOW,
Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, the United States of America, by and through William N. Spence, United States Attorney for the Territory of Alaska, Third Division, under the authority and by the direction of the Attorney General of the United States, as principal and Albert

E. Grigsby and M. F. Hendrickson, of Valdez, Alaska, are held and firmly bound unto William B. Poland and Frederick William Low in the sum of One Thousand Dollars (\$1000) to be paid to said William B. Poland and Frederick William Low, their attorneys, executors, or administrators. To which payment, well and truly to be made, we bind ourselves, jointly and severally, our executors and administrators, firmly by these presents.

Sealed with our seals, and dated this 22 day of June, 1915.

Whereas the above-named United States of America have appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree and amended decree in the above-entitled cause entered and rendered in the above-entitled action by the District Court for the Territory of Alaska, Third Division, made and entered on the 29 day of May, 1915, amended by decree and order entered on 21 day of June, 1915.

Now, therefore, the condition of this obligation is such that if the above-named United States of America shall prosecute said appeal to effect, and answer all costs and damages, if said United States of America shall fail to make good said appeal, then [42] this obligation shall be void; otherwise the same shall be and remain in full force, virtue, and effect. In testimony whereof said United States of America has caused *this* presents to be signed by William N. Spence, United States Attorney for the Territory of Alaska, Third Division, acting under the authority and by the direction of the Attorney General of the

United States and the said Albert B. Grigsby and M. F. Hendrickson have signed and sealed these presents the day and year above written.

UNITED STATES OF AMERICA.

By WILLIAM N. SPENCE,

United States Attorney.

ALBERT E. GRIGSBY. [Seal]

M. F. HENDRICKSON. [Seal]

United States of America,

Territory of Alaska,

Third Division,—ss.

I, Albert E. Grigsby and M. F. Hendrickson, being each severally and duly sworn, depose and say: That I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said District; that I am worth in property therein over the sum of Two Thousand Dollars (\$2000), over and above all my just debts and liabilities, exclusive of property exempt from execution; that I am not a counselor, attorney, marshal, clerk, or other officer of any court.

ALBERT E. GRIGSBY.

M. F. HENDRICKSON.

Subscribed and sworn to before me this 22d day of June, 1915.

[Seal]

T. P. GERAGHTY,

Deputy Clerk of Court, Ter. of Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 22, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [43]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 593.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK
WILLIAM LOW,

Defendants.

Citation on Appeal [Copy].

To William B. Poland and Frederick William Low,
Defendants Above-named, and Each of Them,
Greeting:

Whereas, United States of America, plaintiffs above named, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from an order and decree rendered in the District Court for the Territory of Alaska, Third Division, which order and decree was entered in the above-entitled court on May 29, 1915, and which decree was amended therein on June 21, 1915, in your favor, and have given the security required by law; you are therefore hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decrees should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand at Valdez, in said district, this 22d day of June, in the year of our Lord one thousand, nine hundred and fifteen.

FRED M. BROWN,
Judge of the Above-entitled Court.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 22d, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 171. [44]

United States of America,
Territory of Alaska,
Third Division,—ss.

I hereby certify and return that I served the annexed Citation on Appeal on S. O. Morford, attorney of record, for the within named defendants William B. Poland and Frederick Wm. Low, by handing to and leaving a true and correct copy thereof with him personally, at Seward, in said District for said Division, on the 25th day of June, in the year of our Lord one thousand nine hundred and fifteen.

F. R. BRENNEMAN,
United States Marshal.
By Isaac Evans,
Deputy U. S. Marshal.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 28, 1915. Arthur Lang, Clerk. [45]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 593.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK
WILLIAM LOW,

Defendants.

Order Extending Time to File Record.

Now, at this day, for good cause shown to the above-entitled court, it is ordered that the time for filing the transcript of record, proceedings, and papers in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby extended until 31st day of July, 1915.

Done in open court this 24th day of June, 1915.

FRED M. BROWN,

Judge of the Above-entitled Court.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 24, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 175. [46]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 593.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK
WILLIAM LOW,

Defendants.

Acknowledgment of Service of Papers on Appeal.

I, S. O. Morford, attorney of record for the defendants in the above-entitled cause, hereby acknowledge service in the matter of appeal in the above-entitled cause and court on 28th day of June, 1915, at Valdez, Alaska, in the above-entitled district, by receiving copies of the original files and records as follows, to wit:

Petition for Appeal.

Order Allowing Appeal.

Assignment of Errors.

Bond for Cost on Appeal.

Citation.

Order Extending Time to File Records and Papers
in Said Appeal.

Stipulation as to Papers, Documents and Records to
be Sent to the United States Circuit Court of
Appeals for the Ninth Circuit.

Praeceptum.

S. O. MORFORD,

Attorney for Above-named Defendants.

Filed in the District Court, Territory of Alaska,
Third Division. Jun. 28, 1915. Arthur Lang, Clerk.
By —————, Deputy. [47]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 593.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK
WILLIAM LOW,

Defendants.

**Stipulation as to Papers, Documents and Records to
be Sent to the United States Circuit Court of
Appeals for the Ninth Circuit.**

It is hereby stipulated by and between the plain-
tiffs, United States of America, by plaintiffs' at-
torneys William N. Spence, United States Attorney,
and William A. Muny, Assistant United States At-
torney, and the defendants by their attorney, S. O.
Morford, that the transcript of the record on appeal
of the above-entitled cause shall include the following
papers and documents:

Application for Leave to File Amended Complaint
by Plaintiffs.

Order Granting Leave to File Amended Complaint.
Amended Complaint.

Demurrer of the Defendants to the Amended Com-
plaint.

Demurrer of the Defendant Frederick William Low.

Demurrer of the Defendant William B. Poland.

Court's Decision Sustaining Demurrers.

Blue-print Showing Location of Land in Controversy.

Application and Motion for Leave to File Affidavits Showing Value of Subject Matter in Controversy.

Order Allowing Filing of Affidavits Showing Value of Subject Matter in Controversy.

Affidavits of Edmund Rudolph, F. B. Wood, and J. H. Romig, Showing Value of Subject Matter in Controversy.

Order and Decree on Demurrer Sustaining Demurrers of [48] of Defendants and Dismissing Plaintiffs' Action.

Amended Decree Sustaining Demurrers of the Defendants and Each of Them and Dismissing Plaintiffs' Complaint, Amended Complaint, and Action.

Petition of Plaintiffs for Appeal.

Order Allowing Appeal.

Assignment of Errors.

Bond on Appeal with Justification Thereon.

Citation on Appeal with Return and Acknowledgment of Service.

Order Extending Time to File Appeal in Circuit Court of Appeals.

Acknowledgment of Service of All the Different Papers as Set Forth in Said Acknowledgment.

Stipulation as to Papers, to be Sent to the Circuit Court of Appeals for the Ninth Circuit.

Praeipie.

And the Clerk of the above-entitled Court is hereby authorized to eliminate from the said record on appeal all the other matters in said record.

UNITED STATES OF AMERICA.

By WILLIAM N. SPENCE,
United States Attorney.

WILLIAM A. MUNLY,
Assistant U. S. Attorney.

S. O. MORFORD,
Attorney for Defendants.

Filed in the District Court, Territory of Alaska,
Third Division. Jun. 28, 1915. Arthur Lang, Clerk.

By ———, Deputy.

Dated this 28th day of June, 1915. [49]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 593.

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM B. POLAND and FREDERICK WILLIAM LOW,

Defendants.

Praeipie for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please make, certify and transmit forth-

with to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, a copy of the record in the above-entitled cause, as a return to the appeal heretofore taken and granted by the plaintiffs, the United States of America, to review the decree and amended decree in the above-entitled cause, which record shall consist of the following files and records, to wit:

Application for Leave to File Amended Complaint
by the Plaintiffs.

Order Granting Leave to File Amended Complaint.
Amended Complaint.

Demurrer of the Defendants to the Amended Complaint.

Demurrer of the Defendant Frederick William Low.

Demurrer of the Defendant William B. Poland.

Court's Decision Sustaining Demurrers.

Blue-print Showing Location of Land in Controversy.

Application and Motion for Leave to File Affidavits
Showing Value of Subject Matter in Controversy.

Order Allowing Filing of Affidavits Showing Value
of Subject Matter in Controversy. [50]

Affidavits of Edmund Rudolph, F. B. Wood, and J. H.
Romig, Showing Value of Subject Matter in
Controversy.

Order and Decree on Demurrer Sustaining Demurrers of Defendants and Dismissing Plaintiff's Action.

Amended Decree Sustaining Demurrers of the Defendants and Each of Them and Dismissing Plaintiffs' Complaint, Amended Complaint, and Action.

Petition of Plaintiffs for Appeal.

Order Allowing Appeal.

Assignment of Errors.

Bond on Appeal, with Justification Thereon.

Citation on Appeal with Return and Acknowledgment of Service.

Order Extending Time to File Appeal in Circuit Court of Appeals.

Acknowledgment of Service of All the Different Papers as Set Forth in said Acknowledgment.

Stipulation as to Papers, to be Sent to the Circuit Court of Appeals for the Ninth Circuit.

This Praecept.

WILLIAM N. SPENCE,
United States Attorney.

Filed in the District Court, Territory of Alaska,
Third Division. Jun. 28, ——. Arthur Lang,
Clerk. By ————, Deputy. [51]

*In the District Court for the Territory of Alaska,
Third Division.*

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,

Territory of Alaska.

Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the

Territory of Alaska, Third Division, do hereby certify that the above and foregoing, and hereto annexed 51 pages, numbered from 1 to 51, inclusive, are a full, true and correct transcript of records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office; that this transcript is made in accordance with the plaintiff's praecipe on file herein. I further certify that the foregoing transcript has been prepared, examined and certified to by me on behalf of the plaintiff and plaintiff in error, the United States of America.

In witness whereof, I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 28th day of June, A. D. 1915.

[Seal] ARTHUR LANG,
Clerk of the District Court, Territory of Alaska,
Third Division. [52]

[Endorsed]: No. 2621. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. William B. Poland and Frederick William Low, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 3.

Filed July 7, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

v.

WILLIAM B. POLAND
AND
FREDERICK WILLIAM LOW,
Appellees.

Brief of Appellant

Upon Appeal from the District Court of the United States
for the Territory of Alaska, Third Division

WILLIAM N. SPENCE,
United States Attorney,

WM. A. MUNLY,
Assistant United States Attorney.
Attorneys for Appellant.

S. O. MORFORD and IRA BRONSON,
Attorneys for Appellees.

**United States
Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA,
Appellant,

v.

WILLIAM B. POLAND
AND
FREDERICK WILLIAM LOW,
Appellees.

Brief of Appellant

Upon Appeal from the District Court of the United States
for the Territory of Alaska, Third Division

STATEMENT OF THE CASE.

This action was brought by the appellant the United States of America, by and under the authority and direction of the Attorney General of the United States by filing its complaint on July 20, 1912, which complaint prayed that a patent issued to William B. Poland by the United States of America on March 22, 1909, for land embraced within Survey No. 242 embracing 160 acres of land be vacated, cancelled, and declared to be null and void and that a deed made by the patentee, William B.

Poland to Frederick William Low conveying land embraced in Survey No. 242 be also vacated, cancelled, and declared to be null and void.

That thereafter, upon application to the court leave was granted to the appellant to file an amended complaint, and said amended complaint was filed in the District Court of the Territory of Alaska, Third Division, on October 15, 1914, which substantially sets forth the following facts:

That heretofore, to-wit, on or about the 6th day of September, 1905, the above named defendant, William B. Poland entered upon and took possession of the land hereinafter described, said land being then and there part of the public lands and public domain of the United States, with the purpose and intent of acquiring title thereto as the assignee of certain soldier's additional homestead entry rights, pursuant to Section 2306 of the Revised Statutes of the United States and Acts amendatory thereto, and caused an official survey thereof to be made, whereby said land was surveyed in the form of two tracts or parcels of land; said land entered and surveyed as aforesaid, is in the Kenai Recording Precinct, District of Alaska, and more particularly bounded and described as follows:

United States Survey No. 241.

Beginning at corner No. 1 on the shore of Resurrection Bay, latitude sixty degrees, seven minutes north, longitude one hundred forty-nine degrees, seven minutes west, said point being marked by an iron pin, three inches in diameter, marked "S. 241, cor. No. 1", thence

south sixty-one degrees, thirty-seven minutes west, two and sixty-one-hundredths chains; thence south seventy-eight degrees, west nineteen and ten-hundredths chains; thence south fifty-two degrees, fifteen minutes west, ten chains; thence south seventy-one degrees, fifty minutes west, three chains; thence south thirty-one degrees, twenty-seven minutes west, three and twenty-hundredths chains to corner No. 2, which corner is marked by an iron pipe three inches in diameter, marked "S. cor. No. 2", thence west six and fifty-nine-hundredths chains to corner No. 3, which corner is marked by an iron pipe three inches in diameter marked "S. 241, cor. No. 3", thence north forty-seven and eighty-eight-hundredths chains to corner No. 4, which corner is marked by an iron stake three inches in diameter marked "S. 241, cor. No. 4", thence east forty chains to corner No. 5, which corner is marked by iron pipe three inches in diameter, marked "S. 241, cor. No. 5", thence south thirty-two and eighty-eight-hundredths chains to corner No. 1, the place of beginning, containing one hundred fifty-nine and seventy-five one-hundredths acres, being the land embraced in United States Survey No. 241, according to the official plat of said survey returned to the General Land Office by the Surveyor General, and

United States Survey No. 242.

Beginning at corner No. 1 near the north shore of Resurrection Bay, identical with corner No. 5, U. S. Survey No. 241, an iron pipe three inches in diameter, marked "S. 242, cor. No. 1"; thence west forty chains to corner No. 2, an iron pipe three inches in diameter, marked "S. 242, cor. No. 2", thence north forty chains to corner No. 3, an iron pipe three inches in diameter, marked "S. 242, cor. No. 3"; thence east forty chains to corner No. 4, an iron pipe

three inches in diameter marked "S. 242, cor. No. 4"; thence south forty chains to corner No. 1, the place of beginning, containing one hundred and sixty acres, being the land embraced within United States Survey No. 242, according to the official plat of said survey returned to the General Land Office by the Surveyor General.

That the land embraced within said survey constitutes and is a single body of land, containing 319.75 acres.

That thereafter, to-wit, on the 26th day of April, 1906, the said William B. Poland filed in the United States Land Office, at Juneau, Alaska, two applications whereby he, as the assignee of certain soldier's additional homestead entry rights, applied under Section 2306 of the Revised Statutes of the United States to enter the land above described, one of said applications covering the land embraced in said survey No. 241, and the other application covering the land embraced in said survey No. 242.

That thereafter, to-wit, on the 20th day of January, 1908, the requisite proofs having been made, a patent for the land embraced in said survey No. 241 was issued to the said William B. Poland, a copy of which patent is hereto attached, marked Exhibit A., and made a part hereof. (Exhibit in Transcript.)

That, on the 30th day of July, 1906, the defendant, William B. Poland, filed or caused to be filed in the United States Land Office at Juneau, Alaska, in support of his said application for a patent to the land embraced in said survey No. 242, an affi-

davit, subscribed and sworn to by H. E. Revell and Frank Ballaine, which affidavit contained the following false statement:

Said tract of land (referring to the land embraced in said Survey No. 242) does not exceed 160 acres in extent and is in frontage less than 160 rods along the shore of any navigable water, and is more than eighty rods distant from any other survey or entry under the provisions of said Act of May 14th, 1898,

the Act referred to in said statement being the Act of Congress entitled "An Act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," approved May 14, 1898, as amended by the Act of Congress entitled "An Act to amend Section one of the Act of Congress approved May fourteenth, eighteen hundred and ninety-eight, entitled 'An Act extending the homestead laws and providing for a right of way for railroads in the District of Alaska,'" approved March 3, 1903.

That said statement was and is false in this, that said tract of land referred to in said affidavit was not more than eighty rods distant from any other survey or entry under the provisions of said Act of May 14th, 1898, as then amended, but was adjoining and contiguous to that certain tract of land embraced within said survey No. 241, upon which a soldier's additional homestead entry and right had been theretofore made by the said William B. Poland as hereinbefore set forth, and was part and parcel of a single body of land containing more

than one hundred and sixty acres, to-wit: 319.75 acres, entered by soldier's additional homestead and entry rights under said Act of May 14th, 1898, as amended, said single body of land being the land embraced within said surveys No. 241 and No. 242.

That said statement was false and fraudulent in that it concealed from the officials of the Land Department of the United States the fact that land in excess of one hundred and sixty acres in a single body was entered by soldier's additional homestead right under the application of the said defendant, William B. Poland, in support of which application said affidavit was filed.

That by means of said false affidavit filed as aforesaid, the said defendant, William B. Poland, knowingly, falsely and fraudulently represented to plaintiffs and to the officials of the Land Department of the United States, whose duty it was to pass upon said application, that no land in excess of one hundred and sixty acres in a single body in Alaska was entered and applied for by soldier's additional homestead rights under said application; whereas in truth and in fact land in excess of one hundred and sixty acres in a single body in Alaska was thereby entered and applied for under soldier's additional homestead rights, which fact the said defendant, William B. Poland, then and there well knew; that the said defendant, William B. Poland, caused said false and fraudulent representations to be made by means thereof, with the intent and for the purpose of deceiving said officials of the Land

Department of the United States and leading them erroneously to believe that the land embraced within said survey No. 242 was open and subject to entry and patent under soldier's additional homestead rights and to induce said officials to cause a patent to issue therefor, and with the further intent to defraud plaintiffs and unlawfully to deprive plaintiffs of the use and enjoyment of said land embraced in said survey No. 242.

That the Assistant Commissioner of the General Land Office of the United States, relying upon the aforesaid false and fraudulent representations and believing them to be true and being induced thereby to do so, in the erroneous and mistaken belief that the land embraced within said survey No. 242 was open and subject to entry and patent under soldier's additional homestead rights and that the defendant, William B. Poland, was lawfully entitled to a patent thereto, mistakenly, erroneously, without authority and in violation of law, and without jurisdiction so to do, approved said entry and application for a patent to the land embraced in said survey No. 242; and thereafter, to-wit, on the 22nd day of March, 1909, the President of the United States, likewise relying upon and being likewise deceived and induced by said false and fraudulent representations, under the same misapprehension as to the law and the facts, mistakenly, erroneously, without authority and in violation of law, and without jurisdiction so to do, caused to be signed, executed and delivered to the said defendant, William

B. Poland, a patent to the land embraced within said survey No. 242, a copy of which patent is hereto attached, marked Exhibit E, and made a part hereof. (Exhibit in Transcript.)

That Congress passed an Act approved March 3, 1903, entitled "An Act to amend Section One of the Act of Congress approved May 14, 1898, entitled 'An Act extending the homestead laws and providing for a right of way for railroads in the District of Alaska'", which, among other things, provides that no more than one hundred and sixty acres shall be entered in any single body by soldier's additional homestead right.

That the land embraced within said survey No. 242 was by the provision of the Act of Congress above mentioned reserved from entry and patent under soldier's additional homestead right by virtue of the soldier's additional homestead entry theretofore made by the said defendant, William B. Poland, upon the land embraced within said survey No. 241; that by force of the foregoing, the patent issued to the said defendant, William B. Poland, for the land embraced within said survey No. 242 was and is null and void for the reason that more than one hundred and sixty acres of land in a single body entered by soldier's additional homestead rights was thereby attempted to be granted to the defendant, William B. Poland.

That thereafter, on the 25th day of May, 1909, the said William B. Poland made, executed and delivered to the above named defendant, Frederick

William Low, and to his heirs and assigns forever, the land hereinbefore described, and covenanting to and with the said Low to warrant and defend the same against any and all persons claiming or to claim title thereto; a copy of which deed is hereto attached and marked Exhibit C, and made a part hereof. (Exhibit in Transcript.)

That the land embraced within said survey No. 242 during all the times hereinbefore mentioned was and now is public land and part of the public domain of the United States and the said United States have been at all times, and now are, entitled to the immediate possession thereof; that the afore-said patent to the land embraced within said survey No. 242 and the deed hereinbefore mentioned, in so far as said deed refers to the land embraced within said survey No. 242, are, and each of them is, a cloud upon plaintiffs' title to said land.

That the appellees and defendants in the lower court, and each of them demurred to said amended complaint of plaintiffs on the ground that said amended complaint did not state facts sufficient to constitute a cause of action against said defendants or either of them either in law or equity, and that said defendant, William B. Poland, further demurred to plaintiffs' amended complaint on the ground that it did not state facts sufficient to constitute a cause of action at law or to entitle the plaintiffs to relief in equity against said defendant, and upon the further ground that it appears from the face of the amended complaint that said defendant is

not a party to said action. That after hearing the arguments of the respective counsels and after taking the matter under consideration, the district court rendered a decision on March 23, 1915, sustaining the demurrer of the defendants and each of them.

Thereafter upon application of the plaintiffs the court made an order, on May 10, 1915, allowing the filing, and making the same a part of the record of the case, the affidavits of J. H. Romig, F. B. Wood, and Edmund Rudolph, showing the amount involved and the value of the subject matter in controversy in said action, which affidavits each showed that said property was worth from three thousand (3000) to five thousand (5000) dollars. That thereafter, and on May 29, 1915, a decree was entered by the court dismissing plaintiffs' action and that thereafter, and on the 21st day of June, 1915, an order was entered amending said decree sustaining the demurrer of the defendants and each of them to plaintiffs' amended complaint, and dismissing said action of plaintiffs.

QUESTIONS INVOLVED.

The questions involved and the manner in which they are raised are shown in the following assignments of error: The court erred in sustaining the demurrers of the defendants and of each of said defendants to the plaintiffs' amended complaint; the court erred in entering the decree and amended decree herein sustaining the demurrers of the de-

fendants and dismissing the amended complaint and the plaintiffs' action herein.

The following points and authorities are relied on by the plaintiffs, appellant herein, to sustain their contentions.

POINTS AND AUTHORITIES.

I.

The principal matter involved in this action is the interpretation and construction to be placed upon Section 101 of the Compiled Laws of Alaska, which embraces the Act of Congress approved March 3, 1903, (See 32 Stat. L. 1028) in regard to the amount or area of land which can be entered under said section by means of soldier's additional homestead rights "*in any single body.*" The plaintiffs in the court below, the appellant here, contend that said Section 101 authorizes the entry of only 160 acres of land under such soldier's additional homestead rights "*in any single body*"; and if any other or further amount or quantity of land is sought to be taken up by any person it must be separate and apart from any other entry under such soldier's additional homestead right, at a distance to be fixed by the regulations, which may be made by the Secretary of the Interior, which regulations are authorized by said Section 101.

II.

It is a general and well settled rule in the construction of statutes that where a statute is of doubtful meaning and susceptible of two construc-

tions, the court may look into prior and contemporaneous acts, the reasons which induced the Act in question, the mischiefs sought to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine the proper construction.

Hamilton vs. Rathbone, 175 U. S. 419.

The Conqueror, 166 U. S. 123.

Smythe vs. Fiske, 23 Wall. 374.

United States vs. Bowen, 100 U. S. 508.

Vitebro vs. Friedlander, 120 U. S. 707.

United States vs. Lacher, 134 U. S. 624.

III.

In construing the statutes courts should not close their eyes to what they know of the history of the country and of the law and the condition of the law at the particular time, of the public necessities felt, and other kindred things, for the reason that regard must be had to the words in which the statute is expressed as applied to the facts existing at the time of its enactment.

Mannington vs. Hocking Valley R. R. Co.,
183 Fed. 155.

Cooley's Const. Lim. (6th Ed.) 69-74.

24 Am. & Eng. Ency. Law, 597, 605, 611, 616,
618.

State vs. Vanderbilt, 37 Ohio St. 643.

In re Hathaway's Will, 4 Ohio St. 385.

State vs. Schlatterbeck, 39 Ohio St. 268, 271.

Smith vs. Townsend, 148 U. S. 494.

Holy Trinity Church vs. United States, 143
U. S. 463.

United States vs. Union Pacific Railroad,
91 U. S. 72.

IV.

The legislation upon the subject of public land has always favored the actual settlers and not speculators, (*Morton vs. Nebraska*, 21 Wall. (U. S.) 671) ; Laws passed by Congress extending the homestead laws of the United States to Alaska, see Act of May 14, 1898, (30 Stat. L. 409) Act of Congress March 3, 1903, amendatory thereof, Section 101 Compiled Laws of Alaska, (32 Stat. L. 1028), were intended to favor actual settlers and the development of Alaska, and were restrictive upon those who strive to obtain public lands in Alaska by the means of scrip, land warrants, and soldier's additional homestead rights. The statute should be construed so that it will effectuate the intention and policy of the legislation and so as to have some purpose and effect.

Stephens vs. Cherokee Nation, 174 U. S. 480.

Lau Ow Bew vs. United States, 144 U. S. 47,
59.

Sioux City etc. R. R. Co. vs. United States,
159 U. S. 360.

United States vs. Jackson, 143 Fed. 786.

United States vs. Winn, 3 Summ. 209; Fed.
Cases No. 16740.

United States vs. Raft of Lumber, 13 Fed.
796.

The Lizzie Henderson, 20 Fed. 524.

United States vs. Ellis, 51 Fed. 808.

United States vs. Lacher, 134 U. S. 624.

V.

Where a statute is of doubtful construction, the construction placed upon it by the officers of the department whose duty it is to construe it is persuasive upon the courts, (*Schell vs. Fauche*, 138 U. S. 562), (*United States vs. Hammers*, 221 U. S. 220), and this rule is strengthened where the statutes direct that the department should make the necessary regulations to carry it into effect, (*Jacobs vs. Pritchard*, 223 U. S. 200). The Commissioner of the General Land Office has ruled that there is a limitation on the acquisition of land in Alaska by means of soldier's additional homestead right to 160 acres in any single body and the court will take judicial knowledge of such ruling in a case on demurrer.

Southern Pacific Railroad Co. vs. Groeck, 68 Fed. 609.

Caha vs. United States, 152 U. S. 211.

VI.

The law is settled that questions of fact arising in the administration of public lands are committed to the officers of the Land Department for determination largely on *ex parte* proceedings, and if applicants for grants and patents impose on such officers and secure grants and patents, any patents

so secured are either void or voidable and may be annulled in a suit brought by the Government.

United States vs. Minor, 114 U. S. 233.

Smelting Company vs. Kemp, 104 U. S. 641.

Burfenning vs. Chicago etc. R. Co., 163 U. S. 323.

Morton vs. Nebraska, 21 Wall. (U. S.) 660.

Eastern Oregon Co. vs. Brosnan, 147 Fed. 809.

Doolan vs. Carr, 125 U. S. 618.

Davis's Admr. vs. Weibbold, 139 U. S. 507-529.

Knight vs. U. S. Land Ass'n, 142 U. S. 161.

Further, if the officers act without authority and if the land purported to be patented was not within their control, then their act was void for want of power in them to act on the subject matter of the patent, in other words, the officers were without jurisdiction to act.

Doolan vs. Carr, 125 U. S. 625 (with large number of citations.)

Burfenning vs. Chicago Railway Co., 163 U. S. 321.

Morris vs. United States, 174 U. S. 243.

Smelter Company vs. Kemp, 104 U. S. 641.

VII.

No tender is necessary to be made by the Government as the prerequisite to cancel the patent in question. The court has full power and control over the matter and may prescribe or not as it sees fit the return of the soldier's additional homestead

right used by the defendants, according to the equities of the case.

Morris vs. United States, 174 U. S. 244.

Piersoll vs. Elliott, 6 Peters (U. S.) 95.

United States vs. Trinidad Coal & Coking Co., 137 U. S. 160.

United States vs. Budd, 144 U. S. 154.

Jones vs. McGinn, 140 Pac. 995.

Bryant vs. Isberg, 74 Am. Dec. 661.

Vanliew vs. Johnson, 6 Thompson's C. 648.

Anthony vs. Day, 52 How. Prac. 35.

Bloomer vs. Waldron, 3 Hill 366.

Hoyt vs. Jacques, 139 Mass. 266.

VIII.

No question about a bona fide purchaser can enter into this case, as the case is one in which the patent was issued without authority or power on the part of the officer of the Land Department. Furthermore the plea of bona fide purchaser would be one of pleading and proof of payment and the recital in the deed would not be sufficient.

United States vs. Brannon, 217 Fed. 851.

Lakin vs. Sierra Buttes Gold Min. Co., 25 Fed. 337.

United States vs. Hill, 217 Fed. 846.

Boone vs. Chiles, 10 Pet. (U. S.) 177.

Wright-Blodgett Co. vs. United States, U. S. Supreme Court, February 23, 1915.

IX.

In regard to the amount involved and the value of the subject matter in controversy, the affidavits filed show that it is over five hundred dollars, the amount required by Section 1337 of the Compiled Laws of Alaska for the purpose of taking an appeal to the Circuit Court of Appeals. When there is nothing in the complaint of the case to show such value, it is good practice to allow affidavits to be filed showing value.

Wilson vs. Blair, 119 U. S. 387.

Sharon vs. Terry, 36 Fed. 349.

Davie vs. Heyward, 33 Fed. 95.

Gage vs. Pumpelly, 108 U. S. 164.

Harris vs. Barber, 139 U. S. 366.

Chesapeake Beach Ry. Co. vs. Washington Ry., 199 U. S. 248.

X.

It is the amount which appears in the Appellate Court that governs the right of appeal.

Decker v. Williams, 73 Fed. 308, citing:

Gordon v. Ogden, 3 Peters (U. S.), 33.

Pittsburgh Loco. Works v. State Nat'l Bank of Keokuk, 154 U. S. 626.

Jones v. Fritchle, 154 U. S. 590.

Railway Company v. Booth, 152 U. S. 671, and a large number of other cases from the United States Supreme Court.

There is no conflict shown in the record here as to the value of the subject matter in controversy as

two affidavits filed in the District Court show that such value is five thousand dollars and the other affidavit fixed the value at three thousand dollars, and no counter affidavits were filed by the defendants.

ARGUMENT.

APPELLANT'S VIEW OF MEANING OF LAW.

This action was brought to set aside, cancel, and annul a certain patent issued by the Land Department of the United States for certain lands situate in the Third Judicial Division of the Territory of Alaska, contained within U. S. Survey No. 242 and embracing one hundred and sixty acres, which patent was issued erroneously and without authority of law, on the 22nd day of March, 1909, to the defendant and appellee, William B. Poland, and afterwards conveyed by him by deed in which there is a consideration of one (\$1.00) dollar and other good and valuable considerations, to the defendant and appellee, Frederick William Low. The main, principal and overshadowing matter for determination in this action is the interpretation and construction to be placed upon Section 101 of the Compiled Laws of Alaska, which embraces the Act of Congress, approved March 3, 1903, (See 32 Stat. L. 1028) in regard to the amount and area of land which can be entered under said section by means of soldier's additional homestead rights, "in any single body."

The plaintiffs contend that said Section 101 authorizes an entry of only 160 acres of land under such soldier's additional homestead right in any

single body, and if any other or further amount or quantity of land is to be taken up, it must be separate and apart from any other entry under such soldier's additional homestead right in any single body, at a distance to be fixed by any regulations that may be made by the Secretary of the Interior, which regulations are authorized by said Section 101.

Plaintiffs, the United States, contend that the meaning of said Section 101, in regard to the restriction in said section is that Congress has made a reservation and restriction on the quantity of land which can be taken up under a soldier's additional homestead right to the limit of 160 acres "in any single body," that there is no warrant or authority of law for the Land Department of the United States for granting a patent for more than said amount, and that consequently the second patent issued on March 22, 1909 to said appellee, William B Poland, embraced in U. S. Survey No. 242, is beyond the power and authority of the Land Department of the United States, to grant, because said Poland, had already taken up 159.75 acres under a soldier's additional homestead right under U. S. Survey No. 241, for which patent had been issued to him in January 20, 1908, and that said tracts were really one tract embracing in all 319.75 acres, thus taking up the latter number of acres in "a single body" in violation of the statute.

APPELLEES' VIEW OF LAW.

The appellees, on the other hand, contend that a person is entitled to enter any number of contiguous

acres of land by soldier's additional homestead rights provided there are no more than 160 acres in any one entry and accordingly, as will be seen from the allegations of the amended complaint, said appellee, William B. Poland, on the same day, to-wit, on the 26th day of April, 1906, filed two applications for land at the United States Land Office at Juneau, Alaska, one embracing Survey No. 241 and the other Survey No. 242, in all embracing 319.75 acres of contiguous land "in one single body."

GENERAL RULES OF STATUTORY CONSTRUCTION.

The appellant will therefore first take up the discussion of this main and principal question of the construction to be placed upon the Act of March 3, 1903, as set forth in said Section 101, leaving the minor points of discussion and consideration for the latter part of this argument.

At the outset it will be well to have in view the general principles of statutory construction which guide courts in ascertaining the meaning of any given statute. It is a general and well settled rule in the construction of statutes that where a statute is of doubtful meaning and susceptible of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs sought to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction, and further where the act is clear upon its face, and when standing alone it is

fairly susceptible to one construction that construction must be given it.

Hamilton v. Rathbone, 175 U. S. 419.

The Conqueror, 166 U. S. 123.

Smythe v. Fiske, 23 Wall. 374.

United States v. Bowen, 100 U. S. 508.

Vitebro v. Friedlander, 120 U. S. 707.

United States v. Lacher, 134 U. S. 624.

And as it was said in *Manning v. Hocking Valley Ry. Co.*, 183 Fed. 155, "Moreover in construing statutes the courts should not close their eyes to what they know of the history of the country and of the law, of the condition of the law at a particular time, of the public necessities felt, and other kindred things, for the reason that regard must be had to the words in which the statute is expressed as applied to the facts existing at the time of its enactment.

Cooley's Const. Lim. (6th Ed.), 69-74.

24 Am. & Eng. Ency. Law, 597, 605, 611, 616, 618.

State v. Vanderbilt, 37 Ohio St. 643.

In re Hathaway's Will, 4 Ohio St. 385.

State v. Schlatterbach, 39 Ohio St. 268, 271.

To the same effect are

Smith v. Townsend, 148 U. S. 492.

Holy Trinity Church v. U. S., 143 U. S. 463.

United States v. Union Pacific Railroad, 91 U. S. 72.

In the case cited by the District Court in its decision, of *Shenk v. Aumiller*, 217 Fed. 969, the

court took into consideration the common knowledge that in 1890 the public land area open to settlement was becoming very limited and that Congress adopted a new policy by limiting the number of acres to be entered by a person and that said limitation applied to all lands except mineral lands, in regard to which Congress continued the liberal policy with a view to discovery and development. And as was said in the case of *Morton v. Nebraska*, 21 Wall. (U. S.) 671, "The legislation upon the subject of public lands has always favored the actual settlers but the construction contended for would discriminate against them and favor persons whose interest Congress has never been swift to prompt,"—referring, as the court was to them, the speculators.

LAND LAWS OF ALASKA FAVOR ACTUAL SETTLERS.

Under these canons of construction it may be seen that the laws passed by Congress extending the homestead laws of the United States to Alaska as shown by the Act of May 14, 1898 (See 30 Stat. L. 409, found on page 454, Carter's Annotated Alaska Codes), and the Act of Congress of March 3, 1903, amendatory thereof, found in Sec. 101 in the Compiled Laws of Alaska (See 32 Stat. L. 1028), were intended to favor the actual settlers and the opening up and development of Alaska, and were restrictive of those who would strive to obtain public lands in Alaska by means of scrip, land warrants, and soldier's additional homestead rights. In other words,

the court can take into consideration the wish and the purpose and the tendency as expressed by those acts that Congress was in favor of the homesteader and pioneer and was opposed to the monopolization of lands by those who had ample means to buy scrip and other speculative means to obtain title to large bodies of lands in Alaska. The court can go further and take into consideration from its knowledge of matters of general history that there had been a flagrant abuse of the use of scrip in other parts of the United States in permitting large corporations to take up some of the most valuable lands, timber and other lands, in the country, which abuse is of common knowledge, shown by the records in the Land Department of the United States and by the general discussion of the matter in the press and publications in different parts of the United States. Congress evidently wished that Alaska might be spared from the invasion of those land locusts and wished to encourage and foster the development of the Territory by those who would be actual occupants of the lands. This spirit and purpose was seen in the first Act, that of May 14, 1898, in which it is provided that, "no indemnity, deficiency or lieu lands pertaining to any land grant whatsoever originally outside of said District of Alaska shall be located within or taken from lands in said District." That Act placed an embargo upon the use of the various lieu scrip owned by many large railroad corporations outside of Alaska, but the Act of March 3, 1903, amendatory thereof, goes further and pro-

vides that "no indemnity, deficiency or lieu land selections pertaining to any land grant outside of Alaska shall be made and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said District except as now provided by law." The last clause "except as now provided by law" evidently refers to such scrip as Valentine scrip and possibly some other which had vested rights on all the public lands in the United States and over which Congress could not exercise any control. But it will be seen that the Act goes further and into greater particularity in excluding the use of scrip and other similar means of taking up land than did the Act of May 14, 1898, in that further provision made in the Act of March 3, 1903, as follows: "And provided further that no more than 160 acres shall be entered *in any single body* by such scrip, lieu selection or soldier's additional homestead right." This provision was not in the Act of May 14, 1898, and from its very terms places a further restriction upon the use of scrip and soldier's additional homestead rights in taking up lands in Alaska. In order to present the exact language of the statute referred to, as far as applicable to the present case and discussion, we present excerpt law of May 14, 1898, as follows:

"Homestead Laws Extended to Alaska: Be it enacted, etc., that the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldier's addi-

tional homestead rights, are hereby extended to the District of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu lands pertaining to any land grant whatsoever originating outside of said District of Alaska shall be located within or taken from lands in said District."

The amendatory law of March 3, 1903, is as follows:

"That all the provisions of the homestead laws of the United States not in conflict with the provisions of this Act, and all rights incident thereto, are hereby extended to the District of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu land selections pertaining to any land grant outside of the District of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said District except as now provided by law; and provided further that no more than one hundred sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right."

We would direct the attention of the court further to the fact that the law of March 3, 1903, provides that all the rights given by said law are subject "to such regulations as may be made by the Secretary of the Interior," and this provision becomes important as in the discussion of this case we will indicate further on. Seeing that there is such a marked and distinct change and amendment made by the law of March 3, 1903, over the law of May 14, 1898, we are now to ask whether Congress meant

anything by the insertion of the words "in a single body," or whether such words are a meaningless interpolation in the later Act of March 3, 1903. There was no restriction of this kind before the Act of 1903 and consequently a person could take up a quantity of land by means of soldier's additional homestead rights limited only to the amount that he possessed. If the construction is followed that is contended for by the appellees there will be absolutely no change in this regard from the Act of May 14, 1898, and the words "in a single body" would be void of meaning, effect, or purpose.

STATUTES SHOULD BE CONSTRUED TO HAVE PURPOSE
AND EFFECT.

Again, we seek the light and aid of the rules of statutory construction to guide us and we insist that one of the primary and fundamental rules is that a statute should be sensibly construed so as to effectuate the intention and policy of the legislature and so as to have some purpose and effect. In speaking of words of a disputed meaning used in a statute in that particular case, the United States Supreme Court, in the case of *Stephen v. Cherokee Nation*, 174 U. S. 480, said: "The words cannot be construed as redundant and rejected as surplusage for they can be given full effect and it cannot be assumed that they intend to defeat but rather that they are an effectuation of the real object of the enactment."

As was said in *Lau Ow Bew v. United States*, 144 U. S. 47-59. "Nothing is better settled than that a statute should receive a sensible construction, such as

will effectuate the legislative intention and if possible avoid an unjust or absurd conclusion." This rule and case are cited with approval in,

Sioux City, etc., R. R. v. United States, 159 U. S. ~~583~~. 349-360.

In *United States v. Jackson*, ¹⁴³~~142~~ Fed. 783, the Circuit Court of Appeals of this District prescribes the rule in the following fashion: "Courts should search out and follow the true intent of Congress and adopt the 'sense' of words which harmonizes best with the context and promotes in the fullest manner the apparent policy and object of the legislation."

United States v. Winn, 3 Summ. 209, Fed. Cases No. 16740.

United States v. Raft of Lumber, 13 Fed. 796.

The Lizzie Henderson, 20 Fed. 524.

United States v. Ellis, 51 Fed. 808.

United States v. Lacher, 134 U. S. 624.

Stephens v. Cherokee Nation, 174 U. S. 480 (*supra*).

If the construction is placed upon the Act that the words in the statute "in any single body" make no change in the law then it would be attributing to Congress the doing of a vain, useless, and senseless thing. On the other hand, a sensible and reasonable view can be taken of these words and one that will promote the apparent policy and object of the legislation which was to place, as we have heretofore remarked, a restriction upon speculators and those seeking to monopolize large contiguous bodies of the public lands in Alaska by the use of the soldier's

additional homestead rights. Said amendatory Act of March 3, 1903, provides that the lands taken up shall be subject to such regulations as may be made by the Secretary of the Interior and the Secretary is thereby empowered to make such regulations so that a sufficient and reasonable distance shall separate lands taken up by means of the soldier's additional homestead rights, and such regulations would give effect to the words "in any single body," and would prevent a person or corporation from taking up a great contiguous body of public lands in Alaska, possibly at some strategic point or in some situation in which the public at large had a great and vital interest.

In other words, it would give the Secretary of the Interior the power given by the Act to use his knowledge of the public lands in Alaska in making statutory rules and regulations under which soldier's additional homestead rights might be exercised and of safe-guarding the rights of the public in any place where it might be desirable and advisable.

DEPARTMENTAL CONSTRUCTION IS PERSUASIVE.

There is another well settled rule of construction of public statutes which we would invoke, to the effect that where the statute is ambiguous or of doubtful construction the construction of the officers of the Department whose duty it is to construe is persuasive on the courts (see *United States v. Hammers*, 221 U. S. 200; *Schell v. Fauche*, 138 U. S. 562), and this rule is strengthened and reinforced where

the statute itself directs that said Department should make the necessary regulations to carry it into effect (*Jacobs v. Pritchard*, 223 U. S. 200). As an evidence of the Departmental construction we present the construction placed upon the use of these words "a single body," of the Act of March 3, 1903, in a memorandum decision of Fred Dennett, Commissioner of the General Land Office, and also the reasons for the same in an opinion and decision by the Acting Commissioner of the General Land Office to the Secretary of the Interior. This memorandum decision and the opinion accompanying it cover the six different points of the law of March 3, 1903, only the sixth of which applies to the present case, but as we contend that such a decision is entitled to come under the judicial knowledge of the court under authorities which we will later cite, the whole memorandum and supporting opinion are given. It will be noted that Commissioner Dennett in the sixth item of his memorandum decision concerning the space that should separate soldier's additional homestead entries holds as follows:

"6th. The holding was that there must be a strip of land at least forty acres in square form, intervening between locations."

The memorandum and opinion in full are as follows:

COMMISSIONER'S MEMORANDUM.

"Upon the return of the Commissioner, Oct. 3, 1911, there was submitted for consideration and signature a paper addressed to the Honorable Secretary of the Interior, initialed 'A,' W.

B. P., propounding certain questions in regard to the construction of the Act of May 14, 1898, as amended by the Act of March 3, 1903. The paper was not transmitted by him for the reason that he felt satisfied, in his own mind, as to the construction to be given the items under consideration and the statutes in question.

On the first question as to the construction of the words 'or other waters' the Commissioner held, that in view of the fact that at the time of the passage of the Act of 1898 the question under discussion was more in regard to the monopolization of the water fronts for fishery purposes, the words 'or other waters' must be construed as meaning all streams of such size and dimensions affording spawning grounds for marketable fish. In regard to the difficulty of enforcement, instructions should be given to the inspectors when reporting on any locations, to set forth in their report, as to whether or not the location abutted on such waters.

2nd. In regard to the measurement of the reserved spaces of eighty rods, the Commissioner held that the measurements should be in conformity with the words of the statute, which provides that there shall be spaces of eighty rods between all such claims, which would indicate that the spaces must be measured along a straight line between the points of the two locations which are the nearest one to another.

3rd. The holding of the Commissioner was that the reservation of eighty rods was a permanent reservation.

4th. The holding was that in no case would a claim be allowed to saddle the stream, inasmuch as that would give more than 80 rods of water line.

5th. No location can be allowed which would in any way prevent access to the water front.

6th. The holding was that there must be a strip of land at least forty acres, in square form, intervening between the locations.

(Signed) FRED DENNETT."

COPY.

'A' W. B. P.

W. B. P.

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON,

September —, 1911.

The Honorable,

The Secretary of the Interior.

Sir:

I have the honor to invite your attention to the provisions of the first section of the Act of Congress approved May 14, 1898, (30 Stat. 409), entitled "An Act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," as the same was amended by the Act of Congress approved March 3, 1903, (32 Stat. 1028), and to the several difficulties which have arisen in the path of a practical administration of that law. So much of the section referred to as pertains to the inquiry to which this communication will be addressed is here quoted as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the provisions of the homestead laws of the United States not in conflict with the provisions of this Act, and all rights incident thereto, are hereby extended to the District of Alaska; subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu land selections pertaining to any land grant outside of the District of Alaska shall be made,

and no land scrip, or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said District except as now provided by law; and provided further, that no more than one hundred and sixty acres shall be entered 'in any single body' by such scrip, lieu selection, or soldier's additional homestead right; and, provided further, that no location of scrip, selection or right along any navigable or other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located, by means of any such scrip or otherwise; and, provided further, that no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof; provided, that no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims; and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said District."

The difficulties to which I have previously adverted have been brought to notice as the result of attempts to construe and apply provisions of the section above cited and quoted, and may be thus stated:

First. The second proviso to the said Section 1, prohibits the appropriation, by location of scrip, by selection or exercise of a soldier's right of additional homestead entry, of any lands lying along or upon "navigable or other waters," within eighty rods of any other lands which may have been located, by means of such scrip, or otherwise, and lying along

the same waters. What is intended by the words "or other waters"? Did Congress intend to make the provisions of this statute operate in respect of lands lying upon and along the most insignificant streams, without regard to the volume of their flow and without distinction between streams flowing perennially and those whose channels carry water only at stated seasons? Are small but permanent lakes and ponds embraced by this expression, as it was intended by Congress to be understood? Or was it designed to have application only to such streams as would, according to the ordinary practice of the Land Department in executing surveys of public lands, be meandered?

It has seemed to this office that to interpret these words as referring to streams and bodies of water of every size and description would be to attribute to the law a meaning which would necessitate its suspension from operation until such time as a connected system of public land surveys in Alaska might be completely executed, and plats of such surveys provided, showing accurately the meanders of every stream and body of water, regardless of its size and character. Reference to the report submitted by the Committee of the two Houses of Congress by whom this bill was preliminarily considered affords no light on the question we are here discussing. The particular words to which we are now referring appear to have been incorporated in the bill while it was in conference. They appear to have received no attention in the short debates which fol-

lowed the presentation of the conference report, except that Mr. Lacey, Chairman of the House Committee on Public Lands, and one of the conferees for the House, in presenting the report of the Conference Committee, stated that, as now framed, the bill would “prevent monopolization of all streams and water courses.”

The words “or other waters” can scarcely be said to be of such vague meaning or ambiguous application as to justify their rejection as unintelligible. The consequences to which construction in accordance with their literal meaning would lead would not be quite absurd, although perhaps inconvenient, and far reaching. After a reasonably full and careful examination of the matter, I can find no good warrant for disregarding these words, or for the departing from their literal meaning, and am of opinion that the legislature intended to conserve access to all permanently flowing or continuous bodies of waters.

Second. Shall the reserved space of eighty rods between claims be measured in a line parallel to the shore line, and following its indentations, or shall it be a straight line, drawn between the two corners on the water front?

It has been held by the Department (Instructions, 29 L. D. 95) that the width of a claim along the shore line must be measured in a line parallel to the meanders of the shore. It is not believed, however, that this rule should govern measurements of reserved spaces *between* claims, and that this space

should be of the full width of eighty rods at all points on its two parallel side lines.

Third. With reference to the limitation on location of scrip and other analogous rights on lands lying along unnavigable waters, did Congress intend to provide for permanent reservation of these intervening strips of land, or was the provision made out of a purpose to prevent monopolization by means of scrip locations and lieu selection rights, leaving the lands embraced in such intervening strips subject to appropriation by entry under laws requiring settlement and residence, or, perhaps, subject to acquisition by purchase for trade and manufacturing purposes?

It is to be remembered that there are two separate and distinct provisions of this statute by which spaces eighty rods in width between claims are exempted from specific appropriations or reserved from appropriation of any kind. The first of these, and the one we are here considering, is found under the first proviso, while the other is annexed by the succeeding proviso, and related to reservations of areas of the same width along *navigable* waters. To this last provision we shall hereafter refer. After a careful examination of the language of the first of these provisions, I am of the opinion that the prohibition against appropriation which it expresses was leveled only against acquisition by any of the methods therein specified, and not against entry under laws contemplating residence and cultivation, or laws providing for occupation and purchase for

trade and manufacturing sites. I shall not indulge in any extended discussion of the reasons for this conclusion, believing that it is in accordance with the natural import of the language employed in the Act, and that the meaning of the statute cannot well be extended by construction beyond what it naturally signifies.

Fourth. If the purpose of the law in the proviso above discussed is to protect streams and water courses from monopolization, regardless of the character of the stream, and if the limit of width which any claim lying along and upon such a stream may possess is eighty rods, may a location or selection be permitted to be made so as to embrace land on both banks of such a stream, thus appropriating a space of eighty rods wide on each side thereof?

If the intent of the law is to be respected and executed in the fullest measure, it might seem that only one bank of any stream would be subject to appropriation under and by means of one claim, and that no claim could be so located as to saddle the stream and appropriate both banks. This question bears some importance in connection with the question heretofore referred to, in relation to the width of claims along the shore line, for the meanders of one shore of a stream may, and often do, differ materially from those of the opposite shore. In view of this fact, it will be at once apparent that, if a claim may be thrown across a stream so as to embrace land on both banks, without any variation in the direction of the courses of its boundary lines,

the length of the shore line appropriated on one bank will be often considerably greater than that of the shore line of that portion of the claim on the other bank.

Fifth. Addressing ourselves now to the reservation of spaces of eighty rods along navigable waters:

To what depth or distance back from and away from the water front shall these reservations be extended in order to accomplish the intent of Congress?

It is well to remember in this connection that the Act of Congress of March 3, 1903, *supra*, affected only so much of the provisions of the Act of May 14, 1898, as were contained in Sections 1 and 10, and did not disturb or impair the force of *all* of the provisions of the last named section. Among the provisions of the earlier Act seemingly remaining in force is that one found in Section 10, whereby the Secretary of the Interior is empowered to grant leases of those reserved strips of land, eighty rods in width, along the shore of navigable waters, authorizing their use for landings and wharves is secured by the roadway sixty feet in width, parallel with the shore line, reserved by and in Section 10 of the last mentioned Act. The design of Congress in making these reservations being thus made manifest, nothing remains to be determined except the question as to what shall be the dimension of these spaces, as measured from front lines to back lines. Shall this measurement be a distance greater or less than eighty rods? Shall these spaces be eighty rods square, or shall they be of such extent and area as to embrace

all the land lying between the claims which they separate, from their courses on the water front, to the corners marking their rear or back boundaries?

In my opinion, this question should be answered by holding that these reservations should be eighty rods square. There seems to be no rule or reason which would fix their dimensions differently, unless the words "a space of eighty rods * * * between all such claims" shall be taken to mean a space eighty rods wide at all points on the lines of these claims on either side of said space. It would seem that the object of the legislation would be sufficiently secured by a construction which would make these reserved spaces eighty rods wide as well as eighty rods in depth, and that this would be arriving at the intention of Congress as nearly as the language it has used will permit.

Sixth. The first proviso to this section expresses a limitation upon the acquisition of lands, in a single body, by the use of scrip, soldier's additional right of homestead entry, or lieu selection, to an area of 160 acres. What is intended by the words "a single body"? and does this prohibition go to only such acquisition by one and the same person, or does it extend to and embrace acquisition by two or more persons, disconnected in interest and unassociated?

In my opinion, a connected body of land is not rendered any the less "a single body" by drawing across it an imaginary or invisible line of division, or even by such visible separation as would be accomplished by means of marked boundaries or fences. In

Jesse D. Carr Land and Live Stock Company v. United States (118 Fed. Rep. 821), it was held that a division fence constructed for the convenience of the occupant did not make two separate enclosures out of what was otherwise one general enclosure. In another case, where a tract of land was situated in two counties, the mere fact that it was crossed by the county line was held not to make it any the less a "single tenement." *Finney v. Somerville* (80 Pa. 59). To me, it seems that the principles, if not the letter of the law, would be violated by a conclusion to the effect that a connected and contiguous body or tract of land, owned by the same person, could be made two separate bodies by drawing across it a surveyor's division line. As to the other branch of this inquiry, whether two different and unassociated persons may lawfully acquire, by separate and distinct locations, an area of more than 160 acres, which, but for the surveyor's division, and separation of ownership, would constitute a "single body" of land, there may be more room for doubt and discussion. Closely scanning the statute, however, I think we may perceive the legislative purpose to restrict alienation of public lands in Alaska, through and by means of scrip locations and rights analogous thereto, to 160 acres, in a connected body, and that in the interpretation and application of this enactment we are obliged to disregard artificially created divisions. The intent of the Act seems to be one to avoid monopolization of land in favored localities, by persons in a position to purchase and employ

these floating and transferable rights; and this intent can scarcely be secured, if we are to recognize artificially effected divisions as creating two separate bodies of land out of what would be, but for such division, a "single body." Of course, the power of regulation conferred upon the Department will authorize it, if this view of the law be adopted, to prescribe and enforce a requirement by virtue of which there will be preserved, between all such scrip locations, tracts of lands of such form and area as will be practically available for homestead entry, or capable of disposition, under some other provision of the laws relating to public lands in Alaska.

Very respectfully,

Acting Commissioner.

It may be argued that this rule of the Department can not be considered by this court for the reason that it is not in the record, as this decree was made on a demurrer to the amended complaint, but the memorandum was used in the argument of the case in the District Court and it is one of which we think the court will take judicial knowledge as shown by the case of *Southern Pacific R. R. Co. v. Groeck*, 68 Fed. 609. This case decides that the acts of the Secretary of the Interior done in the performance of his official duties are matters of which the court takes judicial notice, citing *Caha v. U. S.*, 152 U. S. 211, but under any circumstances we think that this matter should be given great weight by the court as an argument in support of the appellant's contention.

We will now endeavor to analyze the reason given by the District Court for the conclusions arrived at in its construction of the law. It will be noted that the decision of the District Court is largely based upon what the court conceived to be the analogy of the placer mining law to the law under discussion, the court holding that while there is a restriction in said mining law of 160 acres to an association, and 20 acres to an individual, said restriction does not prevent the location of contiguous claims to an unlimited extent and holding further, that the term "location" as used in the mining law is practically synonymous with the term "entry" as used in the Act of March 3, 1903. In regard to this argument we will say that while on first inspection there may appear an analogy between said laws, it will not, we think, bear scrutiny or analysis. There is a vast difference between the meaning of the word "location" as used in the mining law and the word "entry" as used in the homestead laws. Before a location can be made upon mineral land it has been held by the United States Courts and other courts, by an abundant and unvarying line of authorities, that there must be a discovery of mineral before the location can be made and the same interpretation had been placed upon the placer mining law. (See *Steel v. Farmers M. Co.*, 148 Fed. 78). In other words, there could not be an unlimited quantity of land taken up under the mining law, because before a location could be made a discovery of mineral is required. That condition and prerequisite consti-

tute in itself a limitation upon the number of acres of mineral ground that can be taken.

Furthermore, it has been the policy of the Government to favor the development and discovery of minerals and all laws concerning mineral lands have received a liberal construction, as is shown by the very case which is cited by the District Court in its decision, *Shenk v. Aumiller*, 217 Fed. 969. On the other hand, an entry under the homestead laws consists of three things; first, the applicant must make the affidavit required; second, formal application; and third, the payment of the fees, (See 6 Fed. Stat. Ann. 286), and practically the same procedure applies in the case of an entry under the soldier's additional homestead rights, only there is no limit to the entries that may be made, provided a person owns the necessary additional homestead rights. There is no inherent restriction therefore as to such entries, as there is in the case of a location on mineral land, which makes a most important and significant distinction in the meaning of the two words.

From the passage of the Act of May 14, 1898, extending the homestead laws and the right of entry under soldier's additional homestead rights to Alaska, there was an unlimited right to enter soldier's additional homestead rights in the lands of Alaska, up to the law of March 3, 1903. If the interpretation and construction of the District Court in its decision is sound and will prevail, then there is no change whatsoever made by the amendment made by the Act of March 3, 1903. This view of the amend-

ment of the law of 1903 is not tenable, we think, or in accordance with the spirit or letter of the Act. That so far as it relates to entries by soldier's additional scrip it is restrictive as shown by its language. It was restrictive on locations by scrip under the former law of 1898, and was intended to be further restrictive not only of scrip entries, but also upon soldier's additional homestead entries by the language of the amendatory Act of March 3, 1903.

And it will be thus seen that Congress has always exhibited an entirely different policy in regard to mineral lands from its policy in regard to taking up lands in Alaska by scrip rights and those analogous thereto.

WHEN PATENTS MAY BE ANNULLED.

At the outset of the discussion we said that the controlling question to be decided by the court is the one which has just been discussed concerning the construction and interpretation of the Act of Congress of March 3, 1903, but there are other questions of minor importance which arise and which are necessary to discuss. Concerning the granting of the patent by the Land Department of the United States to the defendants, the law is settled that questions of fact arising in the administration of the public land laws are committed to the officers of the Land Department for determination largely on *ex parte* proceedings and if applicants for grants and patents impose on said officers and secure entries and patents, any patent which may be secured by such fraudulent practices is either void or voidable and may be

annulled in a suit brought by the Government against the patentee, or purchaser with notice of the fraud.

United States v. Minor, 114 U. S. 233.

Smelting Co. v. Kemp, 104 U. S. 653.

Burfenning v. Chicago, etc., R. Co., 163 U. S. 321.

Morton v. Nebraska, 21 Wall. (U. S.) 660.

Eastern Oregon Co. v. Brosman, 147 Fed. 809.

Another unquestioned rule is that if the officers of the Government act without authority and if the land which they permitted to go to patent was not within their control or had been withdrawn from their control at the time they undertook to exercise such authority, then their act was void for want of power in them to act on the subject matter of the patent, not merely voidable. As was said in *Morris v. United States*, 174 U. S. 243, quoting from *Smelter Co. v. Kemp*, 104 U. S. 636-641:

“Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the Department had jurisdiction to act and execute; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale.

* * * If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the Department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming

regularity the forms of law may have been observed.

The action of the Department would in that event be like that of any other special tribunal not having jurisdiction of a case which it assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act."

See also *Doolan v. Carr*, 125 U. S. 625, with a large number of citations, *Burfenning v. Chicago, etc., Railway Co.*, 163 U. S. 321. In the present case it is the contention of the Government that the officers of the Land Department issued a patent to the defendant, William B. Poland, that was void. Congress in this case by the Act of March 3, 1903, had placed an inhibition upon the issuance of any patent upon an entry under soldier's additional homestead rights of more than 160 acres "in any single body," while in the present case there was a single body containing 319.75 acres. Such is the allegation in the amended complaint and this allegation is admitted by the interposition of the demurrers of the defendants.

In other words, Congress had absolutely taken it out of the powers of the officers of the Government to grant a patent of more than 160 acres in any single body, and the patent issued on Survey No. 242 was absolutely void for want of power and authority of the Land Department to make it, as it gave the defendant, William B. Poland, taken in

connection with his patent for Survey No. 241, a tract of 319.75 acres in a single body, in contravention to the plain language and spirit of the statute. And it made no difference whether there were any regulations made by the Secretary of the Interior in force at the time. The regulations could fix the space to separate the tract, but under no circumstances had the Land Department any authority to grant a patent to more than 160 acres of land "in any single body." The language is not in any single entry but in any single body, and to say that a man can take 319.75 acres of land in a single, contiguous body as was admittedly done in this case, is to take a position at utter variance with and in defiance of the statute.

NO TENDER NECESSARY.

Another question has arisen on the demurrer concerning the absence of a tender or offer in the plaintiffs' amended complaint on the part of the Government to return the soldier's additional homestead right which was used by the defendant in obtaining his patent.

The Government contends that in a case of this character no tender or offer is necessary to be made. The maxim that he who seeks equity must do equity is not violated by the omission of the plaintiffs to do so, and in a suit to cancel a patent, upon the ground of fraud or wrongful act, to obtain the issuance thereof, it is not necessary to allege a restoration of or an offer to return the consideration or even a willingness to do so, in order to obtain equit-

able redress. The court has full power and control over the matter and may prescribe or not as it sees fit under the circumstances and equities of the case whether a restoration of the consideration should be made.

In *Morris v. United States*, 174 U. S. 244, it was said:

“It is urged on behalf of those claiming under the Kidwell patent that a court of equity will not set aside the patent at the suit of the United States, unless on an offer by the latter to return the purchase money; that, in granting the relief, the court will impose such terms and qualifications as shall meet the just equities of the opposing party.

As the invalidity of the patent in the present case was not apparent on its face, but was proved by extrinsic evidence, and as the controversy respecting the title was not abandoned by the defendants, they were not, we think, entitled to a decree for a return of the purchase money, or for costs. *Piersoll v. Elliott*, 6 Pet. 95.”

See also,

United States v. Trinidad Coal & Coking Co.,
137 U. S. 160.

United States v. Budd, 144 U. S. 154.

Jones v. McGinn, 140 Pac. 995.

Bryant v. Isburgh, 74 Am. Dec. 661.

Van Liew v. Johnson, 6 Thomp. & C. 648.

Anthony v. Day, 52 How. Prac. 35.

Bloomer v. Waldron, 3 Hill, 366.

Hoyt v. Jacques, 129 Mass. 286.

NO QUESTION OF BONA FIDE PURCHASER.

No question of bona fide purchaser can enter into this case as the case was one in which the patent was issued without authority or power on the part of the officers of the Land Department. Furthermore, the plea of bona fide purchaser would be one of pleading a proof of payment and the recital of the deed would not constitute such proof of payment.

United States v. Brannan, 217 Fed. 851.

United States v. Hill, 217 Fed. 846.

Boone v. Chiles, 10 Pet. (U. S.) 177.

AMOUNT INVOLVED.

In regard to the amount involved and the value of the subject matter in controversy, the affidavits filed in the District Court show that it is over \$500, the amount required by Section 1337, of the Compiled Laws of Alaska, for the purpose of taking an appeal to the Circuit Court of Appeals.

When there is nothing in the complaint of the case to show such value, it is proper practice for the court below to allow affidavits to be filed showing the value.

Wilson v. Blair, 119 U. S. 387.

Sharon v. Terry, 36 Fed. 349.

Davie v. Heywood, 33 Fed. 95.

Gage v. Pumpelly, 108 U. S. 164.

Harris v. Barber, 139 U. S. 366.

Chesapeake Beach R. R. v. Washington R. R.,
199 U. S. 248.

It is the amount which appears in the appellate court that governs the right of appeal.

Decker v. Williams, 73 Fed. 308, citing:

Gordon v. Ogden, 3 Peters (U. S.), 33.

National Bank of Keokuk, 154 U. S. 626.

Jones v. Fritzle, 154 U. S. 590.

Railway Co. v. Booth, 152 U. S. 671, and a large number of other cases from the U. S. Supreme Court.

There is no conflict shown in the record as to the value of the subject matter in controversy, as two of the affidavits filed in the District Court show that such value is \$5000, and the other affidavit fixes the value at \$3000, and no counter affidavits were filed by the defendants.

CONCLUSION.

The United States, the appellant, therefore contends that the patent in this case made to William B. Poland for the tract of one hundred and sixty acres of land, embraced in U. S. Survey No. 242, is void for want of power on the part of the Land Department to issue the same, and that there was manifest error in the decision rendered in the District Court in sustaining the demurrers of the defendants, the appellees herein, and each of them, and that the District Court was manifestly in error in the interpretation and construction placed upon the Act of Congress of March 3, 1903. That for these reasons, the decree and amended decree made and entered herein in favor of the defendants and dis-

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missing the amended complaint of the plaintiff should in all respects be reversed.

Respectfully submitted,

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE UNITED STATES OF
AMERICA,

Appellant,

vs.

WILLIAM B. POLAND and
FREDERICK WILLIAM
LOW,

Appellees.

Brief of Appellers

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Brief of Appellees

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF ALASKA, DIVISION NO. 3.

This action is brought by the United States, praying for the vacation and cancellation of a patent granted to the defendant William B. Poland,

on the 22nd day of March, 1909, by which the said United States conveyed to William B. Poland the lands embraced in Survey No. 242, which are more particularly described in the patent itself set forth as Exhibit "B," in the Plaintiff's Complaint herein. Transcript p. 16. In said action it is further sought to have a certain deed, made by William B. Poland to the defendant Frederick William Low, vacated, cancelled and declared null and void, in so far as it affects the lands covered by said patent.

The gist of the action is that the defendant Poland had previously secured from the United States a patent for the premises included in Survey No. 241, more particularly described in said patent, which is Exhibit "A" attached to said complaint, page 13 Transcript, and which survey No. 241 is bounded on the north by Claim No. 242; and that the defendant Poland, by reason of the acquisition of the two adjoining claims secured from the United States more than one hundred and sixty acres of land entered in a single body in violation of Section 101, of the Compiled Laws of Alaska, being 32 Stat. L., p. 1028.

There is inserted in the Transcript a plat, showing the relative position of the two claims 241 and 242. (See p. 33.) Therefrom it will be seen that only one of said claims extends along the shore of any navigable water.

The Plaintiff alleges that the Defendant Poland

committed a fraud upon the United States, in illegally acquiring title to the lands embraced in Survey No. 242, in that he caused to be filed an affidavit in support of his application for a patent to the land embraced in said Survey No. 242, which said affidavit contained the following false statement:

“Said tract of land (referred to the land embraced in said Survey No. 242) does not exceed 160 acres in extent and is in frontage less than 160 rods along the shore of any navigable water, *and is more than eighty rods distant from any other survey or entry under the provisions of said Act of May 14, 1898*”;

and that the effect of said false affidavit was as set forth at the end of paragraph four of the Amended Complaint,

“That said statement was false and fraudulent in that it concealed from the officials of the Land Department of the United States the fact that land in excess of one hundred and sixty acres in a single body was entered by soldier’s additional homestead right under the application of the said defendant, William B. Poland, in support of which application said affidavit was filed.”

The Plaintiff further alleges that this fraud deceived the various officers of the Government, including the officials of the Land Department and the President of the United States.

Before taking up the real contention of the Plaintiff, with reference to the quantity of land

acquired by the Defendant Poland under Survey No. 242, we desire to call attention to one apparent misstatement in the affidavit in question which, however, has no real bearing upon the case, and in that connection for the purpose of ready reference we quote in full Section 101, of the Compiled Laws of Alaska, Act of March 3rd, 1903, 32 Stat. at L., p. 1028, which is the Act of May 14, 1898, as amended:

Section 101. "That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act and all rights incident thereto, are hereby extended to the District of Alaska, subject to such regulation as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu land selections pertaining to any grant outside of the District of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law; and provided further that no more than one hundred and sixty acres shall be *entered* in any *single body* by such scrip, lieu selection, or soldier's additional homestead right; provided further that no location of scrip, selection, or right along any navigable or other waters shall be made *within the distance of eighty rods of any lands, along such waters, theretofore located* by means of any such scrip or otherwise; and provided further that no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof; Provided, That *no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims*; and that nothing herein contained shall be so construed as to authorize

entries to be made or title to be acquired to the shore of any navigable waters within said district; and no patent shall issue hereunder until all the requirements of sections twenty-two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof except as to commuted lands as herein provided."

It will be seen that under the provisions of the Statute above quoted an entryman may not enter more than one hundred and sixty acres in a single body, and that no location of scrip, selection, or right, *along navigable or other waters*, shall be made within the distance of eighty rods of any lands *along such waters* theretofore located by means of any such scrip *or otherwise*.

We do not find, however, any provision of the law in said section, nor has our attention been called to any provision of the law anywhere, which prohibits an entryman from taking up land within eighty rods, or any other distance, from any other land theretofore located by him, or any one else, except along navigable waters.

A reference to the plat at once discloses the fact that Survey No. 242 is not along any navigable or other water.

We think, therefore, that we may disregard the immaterial misstatement referred to in the affidavit, to the effect that Survey No. 242 is more than

eighty rods distant from any other Survey, or entry, under the provision of the Act of May 14th, 1898. More particularly is this true, in view of the fact that this affidavit clearly shows upon its face, that it refers to the provisions of the original Act of May 14th, 1898, (30 Stat. L. 409, Vol. 2. Sup. to Rev. Stat. p. 755) and of the fact that the lands sought to be acquired would not extend more than eighty rods along the shore and that the provisions of the Act of May 14th, 1898, to which the affidavit referred and which Act was amended by the Act of May 3rd, 1903, above quoted, made no reference whatsoever to the amount of land which could be included in any single entry. In other words, the maker of the affidavit, and the Defendant Poland, were attempting to comply with the requirements of the Act of May 14th, 1898, with reference to the location of claims along the shore and were not otherwise making reference to the relative location of the claims to each other.

As a matter of fact, when read in connection with the Act of May 14, 1898, to which it refers, the affidavit is entirely accurate, for it is obvious that within the meaning of that act, i. e., along the shore of any navigable or other water, Survey No. 242 is not within eighty rods of any other entry.

The statement in the affidavit that the lands comprised in Survey No. 242, were more than eighty rods distant from any other survey, or entry, is

wholly immaterial upon the question of whether or not these two surveys constitute one entry within the prohibition of Section 101.

If these two surveys do not constitute a single entry, the statement is wholly immaterial. If, on the other hand, they do constitute a single entry the statement is absurd on the face of the survey and description and plats. The language of the affidavit is not that the land sought by entry, under Survey No. 242, is not in excess of 160 acres, *including* the prior entry under Survey No. 241. It is, that the survey in question, No. 242, does not exceed 160 acres, which statement is true.

Of course the Respondent realizes that the Appellant may contend that notwithstanding the apparent purpose of the affidavit, and the reference to the Act in pursuance of a compliance with which it was made, yet the statement that Claim No. 242 is more than 80 rods distant from any other survey, or entry, under the provisions of said Act might lend color to the impression in the minds of the Government officials, that Claim No. 242 could not be a part of another entry in any event, because it was at least 80 rods distant from any other claim.

It is hard to conceive of such an idea in the mind of any Government official, when we take into consideration the following language, contained in the patent itself, which reads as follows:

“Beginning at Corner No. 1 near the North shore of Resurrection Bay” (*which is not on the shore*) “identical with Corner No. 5 U. S. Survey No. 241.”

This is the language contained in the introductory clause to the patent, which is now sought to be annulled, and which is set forth as Exhibit “B” to the complaint herein.

In other words, this patent shows upon its face, and the survey upon which it was based, showed upon its face, that these two locations—these two claims—were identical in a common corner, and the descriptions show upon their face, that they abut each other on a line drawn East and West.

To say that the Defendant Poland, under such circumstances, deceived the Government officials is to accuse them of a lack of ordinary intelligence, which seems to us impossible for a moment to entertain.

In fact we do not believe that the Plaintiff will seriously contend that the officers of the Land Department were not fully aware of all of the facts in this case. We rather think that the contention will be that the Defendant Poland induced the officers of the Land Department to believe that the two claims, although they adjoined each other, as shown by the Government records, the surveys, plats, notes, etc., did not, as a matter of law, constitute a single body. In other words, it may be contended that he induced the officers of the Land Department to wrongly construe the language of the statute.

We think that if such is the contention, several conclusive answers are available. First, that the construction which they placed upon the statute was correct; and second, that the plaintiff is without any relief for such misconstruction of the law by its officers after the proceedings had passed to patent, and that the complaint is further fatally defective for want of any offer to return to the entryman the consideration which he paid for the land, and that this action cannot be maintained against the Defendant Low.

As to the first, it should be borne in mind that these two transactions were separate and distinct, as to application, surveys and proceedings, and that the patent as to claim under Survey No. 241 was issued on the 20th day of January, 1908, and as to the claim under Survey No. 242 was issued on the 22nd day of March, 1909.

Under such a state of facts the Defendant Poland, on the 20th day of January, 1908, became the owner, under patent from the United States, of the lands comprising Survey No. 241, the title to which has never been questioned. It surely will not be argued that at that time Survey No. 241 comprised, with Survey No. 242, a single parcel of land, because the ownership in one rested in the Defendant Poland, and in the other in the United States.

Manifestly then, if the Defendant Poland entered more than 160 acres in a single body, he did so

when he entered the other parcel, to-wit, Survey No. 242, a long time subsequently. And yet the same process of reasoning prohibits this conclusion, for he could not enter, at a later time, what he had previously entered, so as to relate the two into a single entry, or so as to make two entries of single bodies, into one entry of a single body.

A reading of the Act of March 3rd, 1903, without any attempt to distort the plain language thereof, it seems to us, must lead to the conclusion that what is meant by the words, "shall be entered in a single body" can mean only, shall be entered in one entry, at one time, by one person. Any other interpretation of the language, it seems to us, is simply and plainly a distortion thereof.

The Act does not provide, nor is there any reason which we think can be suggested, why it should have been meant to provide, that one individual could not acquire, by separate entries, more than 160 acres, whether the same adjoined other lands acquired by such individual, or by others.

The analogy which has been drawn by the Trial Judge between the case at bar and the cases arising under the Mining Laws of the United States, it seems to us, is clear, and is urged at this time without taking up the time of the Court in the repetition thereof. We refer to that part of the opinion which is set forth on page 29 of the Transcript herein.

We have assumed thus far that the real con-

tention of the Appellant will be to the effect that the officers of the Land Department in reality made a mistake of law. If, however, it is contended that the mistake is one of fact as to whether or not Survey No. 241 and Survey No. 242 constituted a single body of land, then it is apparent that the elements necessary, in order to invoke the jurisdiction of a court of equity, in two main requirements are wanting in this case. There is wanting an intention on the part of Poland to defraud, because as we have shown, the affidavit in question bears upon its face the evidence of the purpose for which it was drawn, and the act to which it referred, to-wit, the Act of 1898, which fixed no limit upon the amount of land to be entered, except such as was along navigable waters.

It is further wanting in any reliance upon such representation by the officers of the Government, because they must have been just as well acquainted with such a fact, as is in question here, as was the Defendant Poland. The fact in question could only be determined by a survey. It *was* fully and absolutely determined by a survey, and the survey was made under the direction of the Superior Officers of the Land Office, and the record thereof came to their hands before any of Poland's rights had accrued.

It seems to us unnecessary to cite authorities in support of the proposition that, where the officers of the Land Department have passed upon a ques-

tion of fact, and *have been informed* of the facts, that no question of representation by a claimant under the land laws will upset their decision thereon.

We cite, however, a recent case of

U. S. vs. Primrose Coal Co., 216 Fed. p. 553
at p. 557, and cases then cited;

and the case of

Burke vs. So. Pacific Railway Co., 234 U. S.
p. 690; 58 L. Ed. p. 1527,

wherein Mr. Justice Van de Vanter for the Court, at page 1548 quotes with approval from the decision in the case of

Knight vs. United Land Association, 142 U.
S. p. 161 at p. 178; 35 L. Ed. 974 at page
980.

Mr. Justice Van de Vanter, in the case of *Burke vs. So. Pacific Railway Company*, at page 1550, quotes further in illustrating the methods and proceedings of the Land Office, in support of the care which is exercised by the officers of the Land Department, in order to advise themselves as to the actual facts relating to the applications which come before them.

This case is particularly illuminating, if the plaintiff shall attempt to argue that the officers of the Land Department could, under any conceivable state of facts, have been ignorant of the relations of these two surveys to each other.

In the case of

Atlantic Delaine Company vs. James, 94 U. S.
p. 207; 24 L. Ed. p. 112 at p. 114,

Mr. Justice Strong uses the following language:

“Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them.”

This case was quoted in the case of

U. S. vs. Maxwell Land Grant Company, 121
U. S. p. 325; 30 L. Ed. 949,

and on page 959 Mr. Justice Miller uses the following language:

“We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal.”

In the case of

U. S. vs. Barber Lumber Co., 194 Fed. page
24 at p. 36,

the U. S. Circuit Court of Appeals for the Ninth Circuit quotes from the *Maxwell Land Grant* case and reiterates the decision quoted.

The Appellees are so confident of the correctness of the position heretofore taken in their brief, that they deem it unnecessary to enter extensively into a further argument with respect to the insufficiency of the complaint as against the Defendant Low. But the allegations of the complaint in this case set forth the transfer from Poland to Low, in paragraph eight thereof, page 11 of the Transcript, in language which must be conceded to admit that Low was a purchaser for value of the premises in question, subsequent to the issuance of the patent. The language is, that the Defendant Poland "conveyed, bargained, sold and confirmed * * * to the Defendant Low and to his heirs and assigns the lands in question," with a covenant of general warranty.

There is no allegation in the complaint that the Defendant Low had any knowledge whatsoever of the alleged defects in the title, or of the facts set forth in the complaint.

In the case of

U. S. vs. Detroit Timber & Lumber Co., 200
U. S. 319; 50 L. Ed. p. 499,

the Supreme Court of the United States holds that a purchaser from an entryman is not charged with knowledge of the wrongful character of the acts of the entryman and quotes with approval from the case of

Wilson vs. Wall, 6 Wallace 83; 18 L. Ed. 727, 730.

“A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only refer to *Sugden on Vendors*, p. 622, where he says: ‘In *Ware vs. Egmont*, 4 DeG. M. & G. 460, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by prudent caution, have obtained the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence.’”

It is respectfully submitted that the decision of the Lower Court should be affirmed.

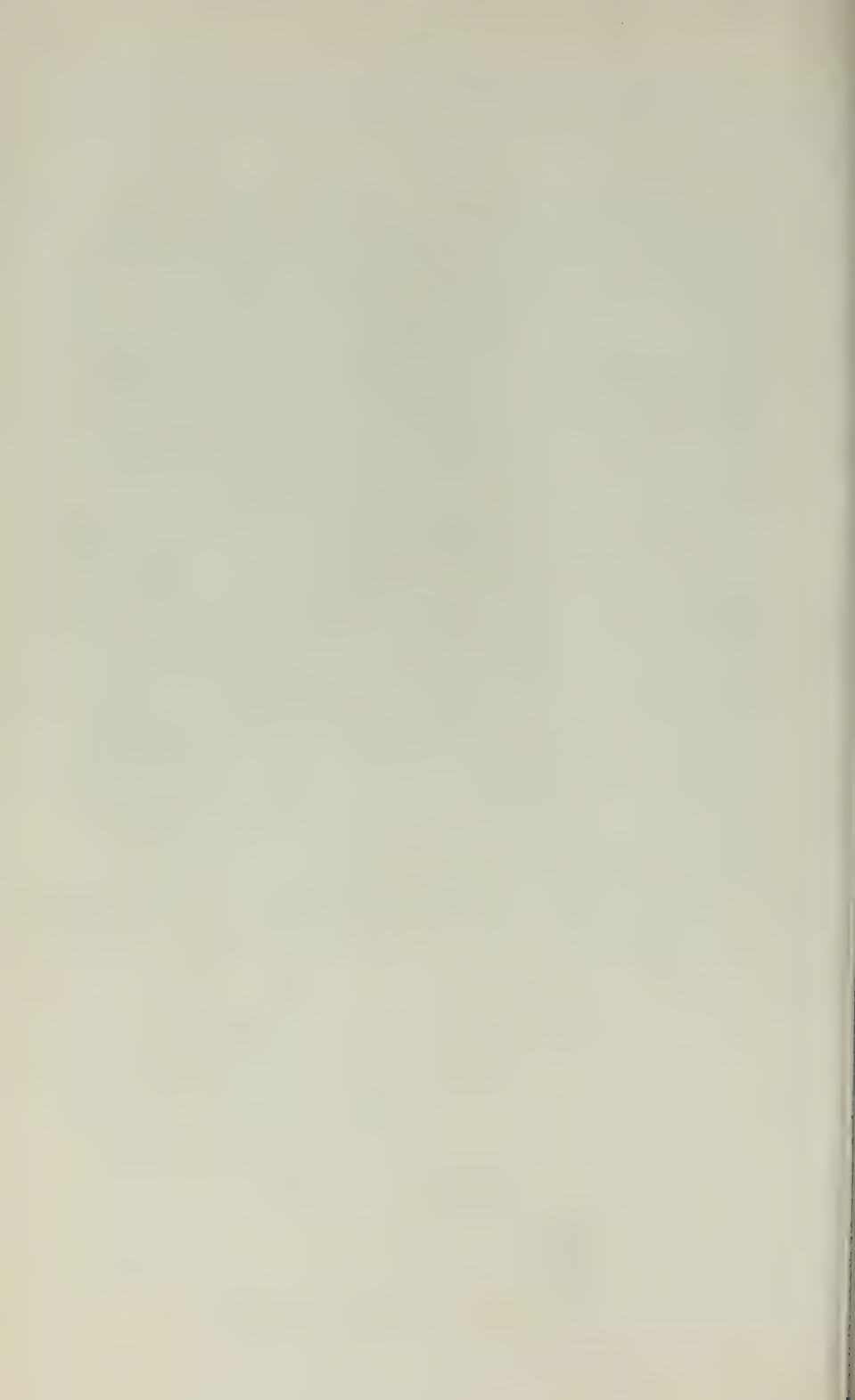
Respectfully submitted,

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United States
Circuit Court of Appeals

For the Ninth Circuit.

N. RUDEBECK, R. H. RAMSAY and DORA A.
RAMSAY,

Petitioners,

vs.

W. P. SANDERSON, as Trustee in Bankruptcy of the
NONPAREIL CONSOLIDATED COPPER
COMPANY, a Corporation, Bankrupt, and NON-
PAREIL CONSOLIDATED COPPER COM-
PANY, a Corporation,

Respondents.

In the Matter of the NONPAREIL CONSOLIDATED
COPPER COMPANY, a Corporation, Bankrupt.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, of a Certain Order of the United
States District Court for the West-
ern District of Washington,
Northern Division.

Filed

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E. D. Monckton,
Clerk.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

No. —.

In the Matter of the Insolvency of the NONPAREIL
CONSOLIDATED COPPER COMPANY,
Bankrupt.

Notice of Filing Petition for Review.

To W. P. Sanderson, as Trustee in Bankruptcy of the
Nonpareil Consolidated Copper Company, and
to William Hickman Moore, His Attorney, and
to Nonpareil Consolidated Copper Company, and
to Palmer Kennedy, Its Attorney:

You and each of you are hereby notified that on the
17th day of July, 1915, at the hour of ten o'clock in
the forenoon of said day, we will file in the Clerk's
office for the United States Circuit Court of Appeals
for the Ninth Circuit, in the City of San Francisco,
California, the petition for review in the above-enti-
tled cause, a copy of which petition is hereto at-
tached as a part of this notice, and I will then ask
to have the case docketed and the necessary order
made thereon to have such case set down for hearing.

E. H. GUIE,

J. H. GUIE,

Attorneys for Petitioner.

I hereby acknowledge receipt of a copy of the peti-
tion of N. Rudebeck, R. H. Ramsay and Dora A.
Ramsay, stockholders for review herein, and of no-

tice thereof, and the service of the same this 14th day of July, 1915.

WM. HICKMAN MOORE,
Attorney for W. P. Sanderson, Trustee for Bank-
rupt.

Attorney for Nonpareil Consolidated Copper Co.
[1*]

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

No. —.

In the Matter of NONPAREIL CONSOLIDATED
COPPER COMPANY, a Corporation,
Bankrupt.

Petition for Review.

Your petitioners, N. Rudebeck, R. H. Ramsay and
Dora A. Ramsay respectfully show:

1. That there is pending in the District Court of
the United States for the Western District of Wash-
ington, Northern Division, a proceeding in bank-
ruptcy wherein the Nonpareil Consolidated Copper
Company, a corporation organized under the laws of
the State of Washington, with its principal place of
business at Everett, in the said Western District of
Washington, was adjudged bankrupt. The petition
purported to be one in voluntary bankruptcy accord-
ing to Section 3a (5) 30 Stat. 546, as amended by Act
February 5, 1903, c487, 32 Stats. 797, to the effect
that the corporation owed debts which it was unable

*Page-number appearing at foot of page of original certified Petition
for Revision.

to pay in full and that it was willing to surrender all its property for the benefit of its creditors. In default of appearance of adverse parties an adjudication in bankruptcy was made and entered *ex parte* without the taking of any proof of insolvency, and the said respondent W. P. Sanderson was elected trustee in bankruptcy and said W. P. Sanderson is still acting as trustee of said alleged bankrupt estate.

2. That said corporation was adjudged a bankrupt on March 4, 1914. [2]

3. That in the course of said bankruptcy proceedings your petitioners, N. Rudebeck and R. H. Ramsay filed their respective petitions in the said District Court of Washington in said bankruptcy matter, and the petitioner Dora A. Ramsay filed an intervening petition to the petition of R. H. Ramsay, all of said petitions reciting respectively that N. Rudebeck is the owner of five thousand shares of the capital stock in said corporation, and that R. H. Ramsay is the owner of four thousand shares and Dora A. Ramsay the owner of one thousand shares in said Nonpareil Consolidated Copper Company, and that they were such owners of said stock long previous to and at the time of the making and filing of the petition in bankruptcy and the adjudication in bankruptcy, and that as such stockholders they have subsisting interests in the assets and property of said corporation, and that they make and file said petitions as such stockholders for themselves and on behalf of other stockholders similarly situated. That in said petitions it is alleged among other things that the Honorable District Court in which said bankruptcy pro-

ceeding is pending, as appears from the record in said proceeding, did not have jurisdiction to make and enter said order adjudicating said corporation a bankrupt, on the ground and for the reason that the stockholders of said corporation never authorized or empowered the trustees of said corporation to file the petition in bankruptcy therein.

4. That, as appears from said petitions, the said petition in bankruptcy was authorized by resolution of the board of trustees only which was contrary to the laws and statutes of the State of Washington. It further appeared from said petitions of your petitioners that among the assets of said corporation [3] there are 470 acres of valuable timber land on which there is situated about 32 million feet of timber worth at least \$2.00 per thousand; that said timber land is situated in Western District of Washington and that the said timber land and all the assets of said corporation were sold by the trustee in bankruptcy and had been advertised for public sale by the trustee in bankruptcy for the 24th of June, 1915, at two o'clock P. M. of said day and unless ordered and restrained by the said district court the said assets of said corporation would be offered for sale and sold on said day by said trustee in bankruptcy. It was further alleged in said petitions to vacate that the petition in bankruptcy was made and filed in fraud of your petitioners as stockholders and other stockholders similarly situated.

5. It was prayed in said petitions that the order of adjudication entered therein be annulled, vacated and held for naught and that the said trustee in

bankruptcy be enjoined from selling the assets of said corporation and that if a sale be made that such sale be not approved by the Court. That thereupon, upon the filing of said petitions of N. Rudebeck and R. H. Ramsay, the Court issued an order enjoining the referee and the trustee in bankruptcy from proceeding with the sale of the assets of the corporation and assigned a day for the hearing of said petitions to vacate the adjudication in bankruptcy.

6. That thereafter the said trustee in bankruptcy moved to dismiss the petitions of said N. Rudebeck and R. H. Ramsay and the intervening petition of Dora A. Ramsay and to dissolve said restraining order issued as aforesaid, for the reason that it appears upon the face of said petitions that the facts therein stated are insufficient to constitute a valid cause of action or to entitle the petitioners to the relief therein prayed for, or to [4] any relief.

7. That upon hearing being had upon the 8th day of July, 1915, the said Honorable District Court granted said motion to dismiss and dissolve, and made and entered an order on the said 8th day of July, 1915, wherein and whereby it was ordered, considered, adjudged and decreed that the said motions of the said trustee be sustained and said petitions of N. Rudebeck and R. H. Ramsay and said intervening petition of Dora A. Ramsay be and the same were dismissed and the said restraining order theretofore made on the 29th day of June, 1915, be and the same was dissolved and exceptions to the order were allowed these petitioners.

8. Your petitioners charge the fact to be that the

said District Court erred in dismissing their said petitions to vacate the adjudication in bankruptcy, and erred in dissolving said temporary restraining order, and your petitioners are aggrieved thereby.

9. Your petitioners further show that the said District Court committed error in entering the adjudication in bankruptcy herein and that, as appears from the records, the said bankruptcy proceedings on said adjudication in bankruptcy was not authorized by the stockholders of said corporation as is required by the laws and statutes of the State of Washington and that said adjudication was and is void: that under the laws and the statutes of the State of Washington the said fifth act of bankruptcy could not be committed by said board of trustees without authorization from the stockholders of said corporation; that the meeting of the trustees authorizing the making and filing of the petition in bankruptcy was held in the State of Ohio without notice to the stockholders and in fraud of their rights as stockholders.

All of the foregoing facts will be made to appear to your Honors by a transcript of so much of the record in the above-mentioned bankruptcy proceeding as may be necessary to exhibit and explain the manner and form in which the questions of law set forth in this petition arose and were determined, which transcript will be transmitted to this court.

WHEREFORE, Your petitioners respectfully pray that such orders and judgments of the said District Court, as is herein complained [5] of may be reviewed and revised by your Honors according to the merits of your petitioners' contentions and in ac-

cordance with the provisions of the law regarding such proceedings as are herein set forth, and that by the order and decree of this court the said order and judgment of the District Court made July 8, 1915, dismissing the said petitions to vacate and dissolving the said restraining order of June 29, 1915, be reversed, and said District Court direct and enter judgment vacating said adjudication in bankruptcy of said Nonpareil Consolidated Copper Company.

Your petitioners further pray for such other and further relief as the facts in this matter suggest and which to your Honors seem meet.

N. RUDEBECK,
R. H. RAMSAY and
DORA A. RAMSAY,
By E. H. GUIE,
Their Attorney.

E. H. GUIE,
J. A. GUIE,

Attorneys for Petitioners.

United States of America,
State of Washington,
County of King.

N. Rudebeck, being first duly sworn, on oath says: That he is one of the petitioners referred to in the foregoing petition; that he has read the foregoing petition for review and knows the contents thereof and that the matters and things therein contained and set forth are true; that he makes this verification for himself and on behalf of his copetitioners.

N. RUDEBECK,

Subscribed and sworn to before me this 14th day of July, 1915.

[Seal]

E. H. GUIE,

Notary Public in and for the State of Washington,
Residing at Seattle. [6]

[Endorsed]: In the United States Circuit Court of Appeals, for the Ninth Circuit. N. Rudebeck, R. H. Ramsay and Dora A. Ramsay, Petitioners, vs. W. P. Sanderson, as Trustee in Bankruptcy of the Nonpareil Consolidated Copper Company, and the Nonpareil Consolidated Copper Co., a Corporation, Respondents. Petition for Review. [6½]

**[Affidavit of E. H. Dewey Re Service of Notice of
Filing of Petition for Review, etc.]**

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. —.

N. RUDEBECK, R. H. RAMSAY and DORA A.
RAMSAY,

Petitioners,

vs.

W. P. SANDERSON as Trustee in Bankruptcy of
the NONPAREIL CONSOLIDATED COP-
PER COMPANY, and the NONPAREIL
CONSOLIDATED COPPER COMPANY, a
Corporation,

Respondents.

In the Matter of MONPAREIL CONSOLIDATED
COPPER COMPANY, Bankrupt.

United States of America,
State of Washington,
County of King,—ss.

E. H. Guie, being first duly sworn, on oath says:
That he is and at all the times herein mentioned was
a citizen of the United States over the age of twenty-
one years, residing at Seattle, in King County,
Washington, and the attorney for the petitioners N.
Rudebeck, R. H. Ramsay and Dora A. Ramsay; that
on the 14th day of July, 1915, he served Notice of
Filing the Petition for Review and the Petition for
Review of petitioners N. Rudebeck, R. H. Ramsay
and Dora A. Ramsay on the Nonpareil Consolidated
Copper Company by depositing a copy of said Notice
and Petition in the United States postoffice at Seat-
tle, Washington, the postage thereon being prepaid
and addressed to Palmer Kennedy, as the attorney
for the Nonpareil Consolidated Copper Company at
Tacoma, Washington, his street number and office
address being unknown to this affiant.

And further affiant saith not.

E. H. GUIE,

Subscribed and sworn to before me this 14th day
of July, 1915.

[Seal]

J. A. GUIE,

Notary Public in and for the State of Washington,
Residing at Seattle. [7]

[Endorsed]: In the United States Circuit Court of Appeals, Ninth Circuit. N. Rudebeck, R. H. Ramsay and Dora A. Ramsay, Petitioners, vs. W. P. Sanderson as Trustee in Bankruptcy, et al., Respondents. Affidavit of Service. [8]

[Endorsed]: No. 2624. United States Circuit Court of Appeals for the Ninth Circuit. N. Rudebeck, R. H. Ramsay and Dora A. Ramsay, Petitioners, vs. W. P. Sanderson, as Trustee in Bankruptcy of the Nonpareil Consolidated Copper Company, a Corporation, Bankrupt, and Nonpareil Consolidated Copper Company, a Corporation, Respondents. In the Matter of the Nonpareil Consolidated Copper Company, a Corporation, Bankrupt. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, of a Certain Order of the United States District Court for the Western District of Washington, Northern Division.

Received July 17, 1915.

F. D. MONCKTON,
Clerk.

Filed July 23, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

N. RUDEBECK, R. H. RAMSAY and DORA A.
RAMSAY,

Petitioners,

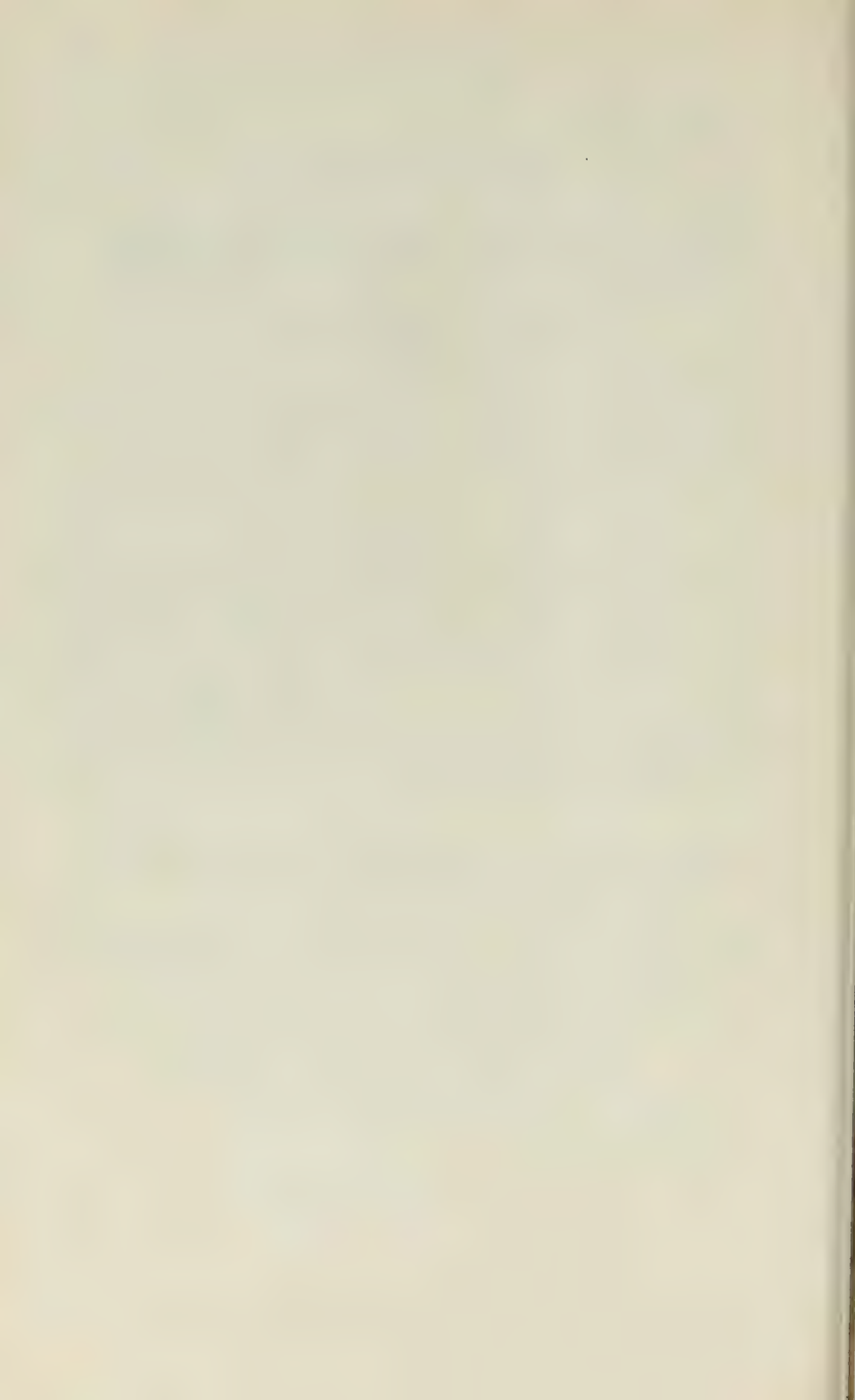
vs.

W. P. SANDERSON, as Trustee in Bankruptcy of the
NONPAREIL CONSOLIDATED COPPER
COMPANY, and the NONPAREIL CONSOLI-
DATED COPPER COMPANY, a Corporation,
Respondents.

In the Matter of the NONPAREIL CONSOLIDATED
COPPER COMPANY, Bankrupt.

**TRANSCRIPT OF RECORD IN SUPPORT OF
PETITION FOR REVISION**

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, a Certain Order of the United
States District Court for the West-
ern District of Washington,
Northern Division.



*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 5035.

In the Matter of NONPAREIL CONSOLIDATED
COPPER COMPANY,

Bankrupt.

Names and Addresses of Counsel.

E. H. GUIE, Esq., Attorney for Petitioners,
810 Leary Building, Seattle, Washington.

J. A. GUIE, Esq., Attorney for Petitioners,
810 Leary Building, Seattle, Washington.

WM. HICKMAN MOORE, Esq., Attorney for
Trustee,
41 Haller Building, Seattle, Washington.

[1*]

Corporation Petition.

To the Honorable Judge of the District Court of the
United States, for the Western District of Wash-
ington, Northern Division.

THE PETITION of the Nonpareil Consolidated
Copper Company having its principal office at the
City of Everett in the county of Snohomish and State
of Washington in the Western District of Washing-
ton respectfully represents:

That this corporation was organized under the
General Incorporation laws of the State of Wash-
ington and is engaged in the business of mining ore.

*Page-number appearing at foot of page of original certified Transcript
of Record.

That it is neither a municipal, railroad, insurance or banking corporation.

That it has had its principal office for the greater portion of six months next immediately preceding the filing of this petition at 410 American National Bank Building, Everett, Washington, within said Judicial District; that it owes debts which it is unable to pay in full; that it is willing to surrender all its property for the benefit of its creditors except such as is exempt by law, and is desirous of obtaining the benefits of the Acts of Congress relating to bankruptcy; and its board of directors has duly authorized such acts on its part.

That the schedule hereto annexed marked "A" and verified by the oath of your petitioner's president, contains a full and true statement of all its debts and (so far as it is possible to ascertain) the names and places of residence of its creditors and such further statements concerning said debts as are required by the provisions of said Acts.

That the schedule hereto annexed marked "B" and verified by the oath of your petitioner's president, contains an accurate [2] inventory of all its property, both real and personal and such further statements concerning said property as are required by the provisions of said Acts.

Wherefore your petitioner prays that it may be adjudicated by the Court to be a bankrupt within the

purview of such Acts.

PALMER KENNEDY,
Attorney.

NONPAREIL CONSOLIDATED COPPER
COMPANY. [Seal]

By SIMON P. ECKI,
President.

United States of America,
Northern District of Ohio,
Eastern Division,—ss.

Simon P. Ecki does hereby make solemn oath that he is the president of Nonpareil Consolidated Copper Company, the corporation mentioned and described as petitioner in the foregoing petition; that the statements therein contained are true according to the best of his knowledge, information and belief; that the reason why this verification is made by deponent and not by the petitioner herein is that the petitioner is a corporation; and that deponent was duly authorized by resolution of the board of trustees of the said corporation to execute the foregoing petition for and in behalf of the said corporation for the purposes therein set forth.

SIMON P. ECKI.

Subscribed and sworn to before me this 30th day of January, A. D. 1914.

L. ROY RUSONS, [Seal]
Notary Public.

Commission expires June 4, 1916.

[Indorsed]: Petition and Schedules. (Schedules Omitted.) Filed in the United States District Court, Western District of Washington, Feb. 28, 1914, at 3

P. M. Frank L. Crosby, Clerk. By B. E. S., Deputy.
[3]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 5035.

In the Matter of NONPAREIL CONSOLIDATED
COPPER CO.,

Bankrupt.

Adjudication of Bankruptcy.

At Seattle, in said District on the 4th day of March, A. D. 1914, before the Honorable JEREMIAH NETERER, Judge of said Court in Bankruptcy, the petition of said Nonpareil Consolidated Copper Co. that it be adjudicated bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Nonpareil Consolidated Copper Co. is hereby declared bankrupt accordingly.

Witness the Honorable Jeremiah Neterer, Judge of said Court, and the seal thereof, at Seattle, in said District, on the 4th day of March, A. D. 1914.

[Seal]

JEREMIAH NETERER,

Judge.

[Indorsed]: Adjudication in Bankruptcy. Filed in the United States District Court, Western District of Washington. Mar. 4, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [4]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

In the Matter of the NONPAREIL CONSOLI-
DATED COPPER COMPANY, a Bankrupt.

**Petition [of N. Rudebeck] to Vacate Adjudication of
Bankruptcy.**

Comes now N. Rudebeck and petitions this Court
and respectfully shows:

1. That petitioner previous to the filing of the
petition in bankruptcy and at the time of the filing
of said petition was and now is a stockholder of the
said Nonpareil Consolidated Copper Company and
the owner of five thousand shares of the capital stock
in said company.

2. That on the 4th day of March, 1914, the said
Nonpareil Consolidated Copper Company was ad-
judicated a bankrupt by this Court.

3. That this Honorable Court did not have juris-
diction to make and enter said order of adjudication
on the ground and for the reason that the stockhold-
ers of said corporation never authorized or em-
powered the trustees of said corporation to file the
petition in bankruptcy herein; that no notice was ever
given to the stockholders of the filing of said petition
in bankruptcy nor of the intention of the president
of said corporation or the trustees thereof to make
and file said petition in bankruptcy nor did they
assent thereto, nor did this petitioner have any such
notice.

4. That the said Nonpareil Consolidated Copper Company is a corporation organized under the laws of the State of Washington with its principal place of business at Everett, Snohomish County, Washington.

5. That said corporation, in violation of the statutes of [5] the State of Washington, has not had as one of its trustees a resident of the State of Washington, and all of said trustees, as your petitioner alleges and believes, are and before and at the time of the making and filing of said petition in bankruptcy were nonresidents of the State of Washington; that it does not appear from said petition, filed herein, that said petition in bankruptcy was even authorized by the board of trustees of said corporation excepting that the president recites in his verification to said petition that he was duly authorized by resolution of the board of trustees of said corporation to execute the foregoing petition for and on behalf of said corporation; that said verification to said petition was made in the State of Ohio, to wit, in the Northern District of Ohio, Eastern Division; that no proof was ever made to this Court that any such meeting was ever held by the board of trustees or any resolution adopted authorizing the filing of said petition in bankruptcy; that if any meetings of the board of trustees or stockholders were held such meetings were held outside of the State of Washington and were illegal and void and contrary to the provisions of the statutes governing corporation meetings under the laws of the State of Washington, and said petition was made and filed without the authority of the

stockholders of said company.

6. That on the contrary the stockholders of said corporation at its last annual meeting held in the year 1913, authorized and empowered the said board of trustees to execute a mortgage and bond in the sum of \$130,000 to liquidate its indebtedness and that said board of trustees on the first day of August, 1913, did pass a resolution and did determine to execute such mortgage against its property not to exceed in the aggregate the sum of \$130,000.00 evidenced by bonds as authorized by the stockholders at its last annual meeting aforesaid. [6]

7. That as your petitioner is informed and believes, that was the last meeting ever held by the stockholders of said corporation, and that said trustees disregarded their duties and the order of the stockholders and wholly failed to execute said mortgage and bonds, but without any meeting of the stockholders or notice to the stockholders or authority from the stockholders and without any formal legal meeting of the trustees, the said Simon P. Ecki did verify and file said petition in bankruptcy upon which the order of adjudication was entered herein.

8. That among the assets of said corporation there are 470 acres of valuable timber land on which there is situated about 32 million feet, worth at least \$2.00 per thousand; that said timber land is situated near Index, Snohomish County, Washington; that said timber land and all of the assets of said corporation have been advertised for public sale by the trustee in bankruptcy for the 24th day of June, 1915, at two o'clock P. M. of said day, and unless ordered

and restrained by this Court the said assets of said corporation will be offered for sale and sold on said day by said trustee in bankruptcy.

9. That your said petitioner, N. Rudebeck, makes this petition on behalf of himself as a stockholder, as aforesaid, and on behalf of other stockholders of said corporation similarly situated.

WHEREFORE, Your petitioner prays:

1. That the order of adjudication entered herein be annulled, vacated and held for naught.

2. That the said trustee in bankruptcy be enjoined from selling the assets of said corporation, and that if a sale be made that such sale be not approved by this Court.

N. RUDEBECK,
Petitioner.

E. H. GUIE,
Attorney for Petitioner. [7]

United States of America,
Western District of Washington,
Northern Division,—ss.

N. Rudebeck, being first duly sworn, on oath says: That he is the petitioner named in the foregoing petition to vacate adjudication of bankruptcy; that he has read the same, knows the contents thereof, and believes the same to be true.

N. RUDEBECK.

Subscribed and sworn to this 23d day of June, 1915.

[Seal]

J. A. GUIE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of a copy and due service hereof admitted this 24th day of June, 1915.

WM. HICKMAN MOORE.

Attorney for Trustee.

Receipt of a copy and due service hereof admitted this 24th day of June, 1915.

C. R. HAWKINS,

Referee in Bankruptcy.

By L.

[Indorsed]: Petition to Vacate Adjudication of Bankruptcy. Filed in the United States District Court, Western District of Washington. June 24, 1915. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy. [8]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 5235.

In the Matter of the NONPAREIL CONSOLIDATED COPPER COMPANY, a Bankrupt.

Affidavit of N. Rudebeck.

United States of America,
Western District of Washington,
Northern Division,—ss.

N. Rudebeck, being first duly sworn, on oath deposes and says: That he is one of the petitioners who has filed a petition herein for the vacation of the judgment of adjudication of the defendant as a bankrupt; that the allegations contained in said petition are true; that affiant is the owner of five thousand

shares of the capital stock of said corporation and was such owner previous to and at the time said judgment of adjudication was made and entered herein; that the trustees of said corporation in authorizing the filing of the petition in bankruptcy, if they did authorize the same, did so without the authority of the stockholders and without notice to the stockholders of said corporation and in fraud of affiant as such stockholder and others similarly situated; that no notice was ever given to the stockholders of said corporation of the intention too file and make such petition nor did the stockholders of said corporation ever authorize or consent to the filing of such petition in bankruptcy, and said petition in bankruptcy was made and filed in the above-entitled action without authority and against the law; that affiant shortly after the adjudication of bankruptcy herein, engaged counsel, who was represented to affiant as being learned in the bankruptcy law, to have said judgment of adjudication vacated on the ground that the same was not authorized by the stockholders of this corporation, but affiant was advised by said counsel that it was not necessary [9] to secure such authorization from the stockholders, and relying on said advice until the filing of the petition by the present attorney for affiant, affiant believed that the advice that he received from his former counsel was correct and that it was not necessary for the trustees to have the authorization of the stockholders to file said petition in bankruptcy, and affiant has not been negligent or guilty of laches in the premises.

That previous to and at the time of the filing of

said petition in bankruptcy and at the time the said petition in bankruptcy was authorized to be made and filed by the board of trustees, if it was so authorized, there were no trustees of said corporation who were residents of the State of Washington, but all of the trustees of said corporation were nonresidents and the acts of the said trustees were in violation of the laws of the State of Washington and null and void.

N. RUDEBECK.

Subscribed and sworn to before me this 3d day of July, 1915.

[Notarial Seal]

E. H. GUIE,

Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of a copy and due service hereof admitted this 6th day of July, 1915.

WM. HICKMAN MOORE,
Attorney for Trustee.

[Indorsed]: Affidavit in Support of Petition to Vacate Judgment of Adjudication. Filed in the United States District Court, Western District of Washington. July 8, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [10]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 5235.

In the Matter of the NONPAREIL CONSOLIDATED COPPER COMPANY, a Bankrupt.

**Petition [of R. H. Ramsey] to Vacate Adjudication
of Bankruptcy.**

Comes now R. H. Ramsey and petitions this Court and respectfully shows:

1. That petitioner previous to the filing of the petition in bankruptcy herein and at the time of the filing of said petition was and now is a stockholder of the said Nonpareil Consolidated Copper Company and the owner of 4 thousand shares of the capital stock in said company.

2. That on the 4th day of March, 1914, the said Nonpareil Consolidated Copper Company was adjudicated a bankrupt by this Court.

3. That the petition in bankruptcy herein was made and filed without any notice or knowledge on the part of petitioner and without any meeting of the stockholders, nor was there any notice given by the board of trustees or other authorized persons of any meeting of the stockholders for such purpose or any purpose.

4. That this Honorable Court did not have jurisdiction to make and enter said order of adjudication on the ground and for the reason that the stockholders of said corporation never authorized or empowered the trustees of said corporation to file the petition in bankruptcy herein.

5. The said Nonpareil Consolidated Copper Company is a corporation organized under the laws of the State of Washington, with its principal place of business at Everett, Snohomish County. [11] Washington. That said corporation in violation of

the statutes of the State of Washington has not had nor did it have at the time of filing the petition in bankruptcy herein, nor had it now, as one of its trustees, a resident of the State of Washington, and all of said trustees, as your petitioner alleges and believes, are now and were before and at the time of the making and filing of said petition in bankruptcy non-residents of the State of; that it does not appear from said petition that the board of trustees of said corporation or the president, Simon P. Ecki, who verified the said petition in bankruptcy, were ever authorized to make and file said petition and this petitioner alleges that said petition in bankruptcy was filed without authority from the stockholders.

6. That among the assets of said corporation there are 470 acres of valuable timber land on which there is situated about 32 million feet of timber worth at least \$2.00 per thousand; that said timber land is situated near Index, Snohomish County, Washington; that said timber land and all the assets of said corporation were sold by the trustee in bankruptcy on the 24th day of June, 1915, and said sale is set for confirmation for June 28, 1915, and unless ordered and restrained by this Court the said sale of said assets of said corporation will be confirmed and said property delivered to the purchaser thereof, to the great loss and detriment of said corporation and of this stockholder and others similarly situated. That the said petition in bankruptcy was made and filed herein in

fraud of this petitioner as a stockholder and other stockholders similarly situated.

R. H. RAMSAY,
Petitioner.

E. H. GUIE,
Attorney for Petitioner. [12]

United States of America,
Western District of Washington,
Northern Division,—ss.

R. H. Ramsay, being first duly sworn, on oath says: That he is the petitioner named in the foregoing petition to vacate adjudication of bankruptcy; that he has read the same, knows the contents thereof, and believes the same to be true.

R. H. RAMSAY.

Subscribed and sworn to this 26th day of June, 1915.

[Seal] WM. H. PERRY,
Notary Public in and for the State of Washington,
Residing at Sedro Woolley, in Skagit County,
Wash.

[Indorsed]: Petition to Vacate Adjudication of Bankruptcy. Filed in the United States District Court, Western District of Washington. June 29, 1915. Frank L. Crosby, Clerk. By ————, Deputy. [13]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 5235.

In the Matter of the NONPAREIL CONSOLI-
DATED COPPER COMPANY, a Bankrupt.

Affidavit of R. H. Ramsay.

United States of America,
Western District of Washington,
Northern Division,—ss.

R. H. Ramsay, being first duly sworn, on oath deposes and says: That he is one of the petitioners who has filed a petition to vacate the judgment adjudicating the Nonpareil Consolidated Copper Company a bankrupt herein; that the allegations contained in said petition are true and correct; that affiant is now and previous to and at the time the corporation was adjudicated a bankrupt, was a stockholder in the said Nonpareil Consolidated Copper Company and the owner of four thousand shares of the capital stock in said company; that the petition in bankruptcy herein was made and filed without any notice or knowledge on the part of this affiant and without any meeting of the stockholders for that purpose, nor was there any notice given by the board of trustees or other authorized persons of any meeting of the stockholders for such purpose; that this affiant did not know that said corporation was adjudged a bankrupt until about the 1st day of Feb., 1915; that the stockholders of said corporation never authorized or em-

powered the trustees of said corporation to file the petition in bankruptcy herein; that the principal place of business of said corporation is in Everett, Washington, and said corporation is organized under the laws of the State of Washington. That said corporation in violation of the statutes of the State of Washington has not had nor did it have at the time of filing the petition in [14] bankruptcy herein nor has it now as one of its trustees a resident of the State of Washington, and all of its trustees, as affiant is informed and alleges the fact to be, are now and were before and at the time of the making and filing of said petition in bankruptcy nonresidents of the State of Washington. That this affiant has a subsisting interest in the assets of said corporation; that said petition in bankruptcy was made and filed herein in fraud of this affiant as a stockholder and other stockholders similarly situated.

R. H. RAMSAY.

Subscribed and sworn to before me this 3d day of July, 1915.

[Notarial Seal]

WM. H. PERRY,

Notary Public in and for the State of Washington,
Residing at Sedro Woolley, Skagit County,
Wash.

Receipt of a copy and due service hereof admitted this 6th day of July, 1915.

WM. HICKMAN MOORE,

Attorney for Trustee.

[Indorsed]: Affidavit in Support of Petition to Vacate Judgment of Adjudication. Filed in the United States District Court, Western District of

Washington. July 8, 1915. Frank L. Crosby, Clerk.
By E. M. L., Deputy. [15]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 5235.

In the Matter of the NONPAREIL CONSOLI-
DATED COPPER COMPANY, a Bankrupt.

**Intervening Petition of Dora A. Ramsay to Vacate
the Judgment of Adjudication.**

Comes now Dora A. Ramsay and by this her inter-
vening petition to the petition of R. H. Ramsay for
the vacation of the judgment adjudicating the Non-
pareil Consolidated Copper Company, a bankrupt,
respectfully shows:

1. That petitioner previous to the filing of the
petition in bankruptcy herein and at the time of the
filing of said petition was and now is a stockholder
of the said Nonpareil Consolidated Copper Company
and the owner of one thousand shares of the capital
stock in said company.

2. That on the 4th day of March, 1914, the said
Nonpareil Consolidated Copper Company was ad-
judicated a bankrupt by this Court.

3. That the petition in bankruptcy herein was
made and filed without any notice or knowledge on
the part of petitioner and without any meeting of the
stockholders, nor was there any notice given by the
board of trustees or other authorized persons of any

meeting of the stockholders for such purpose or any purpose.

4. That this Honorable Court did not have jurisdiction to make and enter said order of adjudication on the ground and for the reason that the stockholders of said corporation never authorized or empowered the trustees of said corporation to file the petition in bankruptcy herein. [16]

5. That said Nonpareil Consolidated Copper Company is a corporation organized under the laws of the State of Washington, with its principal place of business at Everett, Snohomish County, Washington. That said corporation in violation of the statutes of the State of Washington has not had nor did it have at the time of filing the petition in bankruptcy herein, nor has it now, as one of its trustees, as your petitioner alleges and believes, are now and were before and at the time of the making and filing of said petition in bankruptcy nonresidents of the State of Washington; that it does not appear from said petition that the board of trustees of said corporation or the president, Simon P. Ecki, who verified the said petition in bankruptcy, were ever authorized to make and file said petition, and this petitioner alleges that said petition in bankruptcy was filed without authority from the stockholders.

6. That among the assets of said corporation there are 470 acres of valuable timber land on which there is situated about 32 million feet of timber worth at least \$20.00 per thousand; that said timber land is situated near Index, Snohomish County, Washington; that said timber land and all the assets of said

corporation were sold by the trustee in bankruptcy on the 24th day of June, 1915; that this petitioner has a subsisting interest in the assets of said corporation as a stockholder; that the said petition in bankruptcy was made and filed herein in fraud of this petitioner as a stockholder and other stockholders similarly situated.

DORA A. RAMSAY,
Petitioner.

E. H. CUIE,
Attorney for Petitioner. [17]

United States of America,
Western District of Washington,
Northern Division,—ss.

Dora A. Ramsay being first duly sworn, on oath says: That she is the petitioner named in the foregoing petition; that she has read the same, knows the contents thereof, and believes the same to be true.

DORA A. RAMSAY.

Subscribed and sworn to this 3d day of July, 1915.

[Notarial Seal]

WM. H. PERRY,

Notary Public in and for the State of Washington,
Residing at Sedro Woolley, Skagit Co., Wash.

Receipt of a copy and due service hereof admitted
this 6th day of July, 1915.

WM. HICKMAN MOORE,
Attorney for Trustee.

[Indorsed]: Intervening Petition. Filed in the
United States District Court, Western District of
Washington. July 8, 1915. Frank L. Crosby, Clerk.
By E. M. L., Deputy. [18]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 5235.

In the Matter of the NONPAREIL CONSOLI-
DATED COPPER COMPANY, a Bankrupt.

Restraining Order.

In this cause the petitions of R. H. Ramsay and N. Rudebeck, stockholders of the Nonpareil Consolidated Copper Company, have been filed herein praying for the cancellation of the judgment of the Court entered herein adjudging the Nonpareil Consolidated Copper Company a bankrupt, and it appearing to the Court that the trustee in bankruptcy has sold the assets of said corporation and is about to execute a deed therefor, and the Court being duly advised in the premises,

IT IS ORDERED that the referee in bankruptcy and the trustee are hereby enjoined from proceeding further with said sale and the execution of a deed therefor until the further order of this Court and that the 7th day of July, 1915, at the hour of ten o'clock A. M. is hereby fixed as the date for hearing of the said petitions to vacate the said judgment adjudicating the said Nonpareil Consolidated Copper Company a bankrupt, a copy of this order to be served upon the trustee and referee and representative of board of trustees of bankrupt Co.

Done in open court this 29th day of June, 1915.

JEREMIAH NETERER,

Judge.

[Endorsed]: Restraining Order. Filed in the United States District Court, Western District of Washington. June 29, 1915. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy. [19]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 5235.

In the Matter of the NONPAREIL CONSOLI-
DATED COPPER COMPANY, a Bankrupt.

Affidavit of Service.

United States of America,
Western District of Washington,
Northern Division,—ss.

J. A. Guie, being first duly sworn, on oath deposes and says: That he is and at all the times herein mentioned was a citizen of the United States, over the age of twenty-one years. That he is not a party to the above-entitled action and is competent to be a witness therein. That he served a certified copy of the Restraining Order issued in the above-entitled court on the 29th day of June, 1915, by the Honorable Jeremiah Neterer, Judge of said court, upon Ciscero Hawkins, personally, as referee in bankruptcy, in said cause, and upon W. P. Sanderson, personally, trustee of said bankrupt, by delivering to and leaving with said Ciscero Hawkins, personally, referee as aforesaid, and delivering to and leaving with said W. P. Sanderson, Trustee as aforesaid, and each of them a true and correct copy of the original order,

certified to by the clerk of said court as such, in the City of Seattle, King County, Washington, upon the 29th day of June, 1915, and that he deposited a certified copy of said restraining order in the United States postoffice at Seattle, King County, Washington, upon the 3d day of July, 1915, addressed to Palmer Kennedy, representative of board of trustees of bankrupt company, at 913 Fidelity Building, Tacoma, Washington, the postage thereon being duly prepaid.

J. A. GUIE.

Subscribed and sworn to before me this 3d day of July, 1915.

E. H. GUIE,

Notary Public in and for the State of Washington,
Residing at Seattle, King County, Washington.
[20]

[Indorsed]: Affidavit of Service. Filed in the United States District Court, Western District of Washington. July 23, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [21]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 5235.

In the Matter of NONPAREIL CONSOLIDATED
COPPER COMPANY, a Bankrupt.

**Motion to Dismiss Petition of N. Rudebeck to
Vacate Adjudication to Dissolve Restraining
Order.**

Comes now W. P. Sanderson as Trustee in Bank-

ruptcy herein and moves this Honorable Court to dismiss the petition of N. Rudebeck to vacate the adjudication of bankruptcy herein, and to dissolve the restraining order obtained and issued herein on June 29, 1915, for the reason that it appears upon the face of said petition that the facts therein stated are insufficient to constitute a valid cause of action or to entitle the petitioner to the relief therein prayed for, or to any relief.

W. P. SANDERSON,
Trustee in Bankruptcy.

WM. HICKMAN MOORE,
Solicitor for Trustee.

Due service of the within motion acknowledged this 6th day of July, 1915.

E. H. GUIE,
Attorney for N. Rudebeck.

[Indorsed]: Motion to Dismiss Petition of N. Rudebeck to Vacate Adjudication and to Dissolve Restraining Order. Filed in the United States District Court, Western District of Washington. July 6, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [22]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 5235.

In the Matter of NONPAREIL CONSOLIDATED
COPPER COMPANY, a Bankrupt.

**Motion to Dismiss Petition of R. H. Ramsay to
Vacate Adjudication and to Dissolve Restraining
Order.**

Comes now W. P. Sanderson as Trustee in Bankruptcy herein and moves this Honorable Court to dismiss the petition of R. H. Ramsay to vacate the adjudication of bankruptcy herein, and to dissolve the restraining order obtained and issued herein on June 29th, 1915, for the reason that it appears upon the face of said petition that the facts therein stated are insufficient to constitute a valid cause of action or to entitle the petitioner to the relief therein prayed for, or to any relief.

W. P. SANDERSON,
Trustee in Bankruptcy.

WM. HICKMAN MOORE,
Solicitor for Trustee.

Due service of the within motion acknowledged
this 6th day of July, 1915.

E. H. GUIE,
Attorney for R. H. Ramsay.

[Indorsed]: Motion to Dismiss Petition of R. H. Ramsay to vacate Adjudication and to Dissolve Restraining Order. Filed in the United States District Court, Western District of Washington. July 6, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [23]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 5235.

In the Matter of NONPAREIL CONSOLIDATED
COPPER COMPANY, a Bankrupt.

**Order [Sustaining Motions to Vacate Order, Adjudi-
cating Petitioner Bankrupt, etc.; Dismissing
Petitions of N. Rudebeck and R. H. Ramsay and
Intervening Petition of Dora A. Ramsay; and
Dissolving Restraining Order].**

Be it remembered that on this day the motion of W. P. Sanderson, trustee in bankruptcy herein, to dismiss the petitions of N. Rudebeck and R. H. Ramsay and the intervening petition of Dora A. Ramsay to vacate the order made and entered herein on the 4th day of March, 1914, adjudicating Nonpareil Consolidated Copper Company, a bankrupt, and to dissolve the order heretofore, to wit, on the 29th day of June, 1915, made herein, restraining the referee and trustee in bankruptcy from proceeding further in the administration of the estate of the bankrupt, came on duly and regularly for hearing, the petitioners and intervening petitioner appearing by E. H. Guie, Esq., their attorney and solicitor, and the trustee appearing by Wm. Hickman Moore, Esq., his attorney and solicitor, and the Court having heard said petitions and motion read, and the statements and arguments of the attorneys and solicitors,

and being now fully advised in the law and the premises,

IT IS ORDERED, CONSIDERED, ADJUDGED AND DECREED, that said motions be sustained; that the said petitions of N. Rudebeck and R. H. Ramsay, and the said intervening petition of Dora A. Ramsay be, and the same hereby are, dismissed, and that the said restraining order heretofore made herein on the 29th day of June, 1915, be, and the same hereby is, dissolved. [24]

To which order the said petitioners jointly and severally excepted and their exceptions are allowed.

Done in open court this 8th day of July, A. D. 1915.

EDWARD E. CUSHMAN,
Judge.

Due service of the within Order acknowledged this 8th day of July, 1915.

E. H. GUIE,
Attorney for Petitioners, N. Rudebeck et al.

[Indorsed]: Order Dismissing Petitions of N. Rudebeck et al., and Dissolving Restraining Order. Filed in the United States District Court, Western District of Washington. July 8, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [25]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 5235.

In the Matter of NONPAREIL CONSOLIDATED
COPPER COMPANY, Bankrupt.

Certificate of Clerk U. S. District Court to Record.
United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing and attached, to be a full, true and correct copy of Petition (omitting Schedules), Adjudication, Petitions of N. Rudebeck and R. H. Ramsey and Intervening Petition of Dora A. Ramsey to Vacate Adjudication, and Affidavit of N. Rudebeck in Support of his Petition and Affidavit of R. H. Ramsay, Order to Show Cause and Staying Sale, Affidavit of Service of J. A. Guie, Motions of W. T. Sanderson, Trustee, to Dismiss Petitions to Vacate, and Order Dismissing Petitions to Vacate, as the originals thereof appear on file in said Court at the City of Seattle, Washington, in said District.

Attest my official signature and the seal of the said District Court, at the City of Seattle, Washington, July 24, 1915.

[Seal]

FRANK L. CROSBY,
Clerk United States District Court. [26]

[Endorsed]: No. 2624. United States Circuit Court of Appeals for the Ninth Circuit. N. Rudebeck, R. H. Ramsay and Dora A. Ramsay, Petitioners, vs. W. P. Sanderson, as Trustee in Bankruptcy of the Nonpareil Consolidated Copper Company, and the Nonpareil Consolidated Copper Company, a Corporation, Respondents. In the Matter of Nonpareil Consolidated Copper Company, Bankrupt. Transcript of Record in Support of Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Western District of Washington, Northern Division.

Filed July 28, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

N. RUDEBECK, R. H. RAMSAY and DORA A.
RAMSAY,

Petitioners,

vs.

W. P. SANDERSON, as Trustee in Bankruptcy of
the NONPAREIL CONSOLIDATED COP-
PER COMPANY, a Corporation, Bankrupt,
and NONPAREIL CONSOLIDATED COP-
PER COMPANY, a Corporation,

Respondents.

In the Matter of the NONPAREIL CONSOLI-
DATED COPPER COMPANY, a Corpora-
tion, Bankrupt.

SUPPLEMENTAL TRANSCRIPT OF RECORD ON
PETITION FOR REVISION

Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, a Certain Order
of the United States District Court for the
Western District of Washington,
Northern Division.

Filed
SEP 20 1910

United States
Circuit Court of Appeals
For the Ninth Circuit.

N. RUDEBECK, R. H. RAMSAY and DORA A.
RAMSAY,

Petitioners,

vs.

W. P. SANDERSON, as Trustee in Bankruptcy of
the NONPAREIL CONSOLIDATED COP-
PER COMPANY, a Corporation, Bankrupt,
and NONPAREIL CONSOLIDATED COP-
PER COMPANY, a Corporation,
Respondents.

In the Matter of the NONPAREIL CONSOLI-
DATED COPPER COMPANY, a Corpora-
tion, Bankrupt.

**SUPPLEMENTAL TRANSCRIPT OF RECORD ON
PETITION FOR REVISION**

Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, a Certain Order
of the United States District Court for the
Western District of Washington,
Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, for the
Western District of Washington.*

No. —.

In the Matter of the NONPAREIL CONSOLI-
DATED COPPER COMPANY, a Bankrupt,
In Bankruptcy.

Claim of Nicholas Rudebeck.

State of Washington,
County of Snohomish.

Nicholas Rudebeck, being first duly sworn on oath, deposes and says: That he is one of the principal creditors of the Nonpareil Consolidated Copper Company, a corporation, bankrupt; that he is the same Nicholas Rudebeck who was plaintiff in an action brought in Snohomish County, State of Washington, against the Nonpareil Consolidated Copper Company, a corporation, in which a judgment for Nine Thousand Two Hundred Seventy and 55/100 (\$9,-270.55) Dollars was returned in his favor, which said judgment was entered of record in the office of the clerk of the Superior Court of Snohomish County, State of Washington, on the 27th day of February, 1914; that the amount of said judgment is owing by the Nonpareil Consolidated Copper Company, a corporation, to this affiant, and no part of said judgment has been paid and now remains as a valid obligation of said Nonpareil Consolidated Copper Company, a corporation.

NICHOLAS RUDEBECK.

Subscribed and sworn to before me this 30th day of April, 1914.

[Seal]

FRANK L. COOPER,
Notary Public, in and for the State of Washington,
Residing at Everett. [1*]

*In the Superior Court of the State of Washington,
in and for the County of Snohomish.*

No. —.

NICHOLAS RUDEBECK,

Plaintiff,

vs.

NONPAREIL CONSOLIDATED COPPER COM-
PANY, a Corporation,

Defendant.

Judgment.

This matter having been regularly set for trial and coming on to be heard before the Court, in Department No. 1 of said court on the 27th day of February, 1914, plaintiff appearing in person and by his attorneys, E. H. Guie and Howard Hathaway, and the defendant appearing by its attorney, J. A. Coleman, and the plaintiff having introduced his testimony and submitted his proofs, and the Court having duly considered the same, and the defendant having submitted no proof, and the Court being in all things advised in the premises, now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED, that the plaintiff recover of and from the defendant on his first cause of action, judgment in

*Page-number appearing at foot of page of original certified Record.

the sum of Two Thousand Three Hundred Forty-five and 55/100 (\$2,345.55) Dollars, together with interest thereon at the rate of eight per cent per annum from April 1, 1912, until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiff recover of and from the defendant on his first cause of action, judgment in the sum of Two Hundred Seventy-five (\$275) Dollars, as attorneys' fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiff recover of and from the defendant on his second cause of action, judgment in the sum of Six Thousand (\$6,000.00) Dollars, together with interest thereon at the rate of four per cent per annum from the 27th day of February, 1912, until paid. [2]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiff recover of and from the defendant on his second cause of action, judgment in the sum of Six Hundred Fifty (\$650.00) Dollars, as attorney's fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiff recover of and from the defendant his costs and disbursements in this action, amounting to ——— Dollars.

Dated this 27th day of February, 1914.

RALPH C. BELL,
Judge.

O. K. as to form.

J. A. COLEMAN,
By J. M. HOGAN.

State of Washington,
County of Snohomish,—ss.

I, W. F. Martin, clerk of the above-entitled court, do hereby certify that the foregoing instrument is a true and correct copy of the original now on file in my office. In witness whereof, I hereunto set my hand and the seal of said court this 16th day of March, 1914.

W. F. MARTIN,
Clerk.

[Indorsed]: Proof of Claim Nicholas Rudebeck.
Filed Mch. 23, 1914. 3 P. M. John P. Hoyt, Referee. [3]

**[Order Approving Account of Referee in
Bankruptcy.]**

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN BANKRUPTCY—No. 5235.

In the Matter of NONPAREIL CONSOLIDATED
COPPER CO., Bankrupt.

On reading and filing the verified account of John P. Hoyt, the Referee in Bankruptcy before whom the above-entitled matter was pending, and the same appearing to be just and true,

IT IS ORDERED, that said account be and the same hereby is approved and allowed in the sum of \$16.20, as presented.

And it is further ordered that the trustee herein pay to the said John P. Hoyt said sum of \$16.20 in due course of administration.

Done in open court this 21st day of August, 1914.

JEREMIAH NETERER,

Judge of Said Court.

[Indorsed]: Order Allowing Account of Referee. Filed in the United States District Court, Western District of Washington. Aug. 21, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [4]

**[Order Approving Claim of John A. Whalley & Co.
for Premium Upon Bond, etc.]**

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN BANKRUPTCY—No. 5235.

In the Matter of NONPAREIL CONSOLIDATED
COPPER CO., a Bankrupt.

The claim of John A. Whalley & Co. for Five Dollars (\$5.00) premium upon the bond of Bo Sweeney as trustee, and of Ten Dollars (\$10.00) as premium upon the bond of W. P. Sanderson as trustee, in bankruptcy of Nonpareil Consolidated Copper Company, amounting in all to the sum of Fifteen Dollars (\$15.00) having been presented for allowance and having been examined and found correct, it is ordered that the same be allowed and approved for payment as actual and necessary expenses incurred by said trustees in the administration of said estate.

Dated this 30th day of November, 1914.

Signed, C. R. HAWKINS,
Referee in Bankruptcy.

The Trustee is ordered and directed to pay the above claim.

JEREMIAH NETERER,
Judge.

[Indorsed]: Order. Filed in the United States District Court, Western District of Washington. Nov. 30, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [5]

**[Order Appointing James E. Bell et al. Appraisers,
etc.]**

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN BANKRUPTCY—No. 5235.

In the Matter of NONPAREIL CONSOLIDATED
COPPER CO., a Bankrupt.

It is ordered that James E. Bell, Joseph Ferguson and Robert J. McLaughlin, each and all of the City of Seattle and State of Washington, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of said bankrupt set out in the schedules now on file in this court, and report their appraisal to the Court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this 29th day of April, A. D. 1915.

C. R. HAWKINS,
Referee in Bankruptcy.

Western District of Washington.—ss.

Personally appeared the within named James E. Bell, Joseph Ferguson and Robert J. McLaughlin, and separately made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

JAMES E. BELL.

JOSEPH FERGUSON.

ROBERT J. McLAUGHLIN.

Subscribed and sworn to before me this 29th day of April, A. D. 1915.

[Seal] WM. HICKMAN MOORE,
Notary Public in and for the State of Washington,
Residing at Seattle. [6]

[Indorsed]: Order Appointing Appraisers. Filed this 29th day of April, 1915, at 2 o'clock P. M. C. R. Hawkins, Referee. [7]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 5235.

In the Matter of NONPAREIL CONSOLIDATED
COPPER COMPANY, a Bankrupt.

Order to Pay Claims of Appraisers.

The Referee in Bankruptcy having on June 2, 1915, on verified written petition allowed the claims

of James E. Bell, Joseph Ferguson and R. J. McLaughlin, as appraisers of the estate of the bankrupt in the sum of Fifty-six and 10/100 Dollars (\$56.10) each for their services and expenses in appraising said estate,

IT IS ORDERED that said claims be allowed and paid in said amounts respectively.

Dated at Seattle, Washington, this 3d day of June, 1915.

JEREMIAH NETERER,
Judge.

Certified correct.

C. R. HAWKINS,
Referee in Bankruptcy.

[Indorsed]: Order to pay claims of appraisers. Filed in the United States District Court, Western District of Washington. June 3, 1915. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy. [8]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 5235.

In the Matter of NONPAREIL CONSOLIDATED
COPPER COMPANY, a Bankrupt.

Appraisement.

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property of the bankrupt have attended to the duties assigned us, and after a strict

examination and careful inquiry, we do estimate and appraise the same as follows:

Lot 2 Sec. 2 Twp. 27 N. R. 10 E. W. M. . . . \$ 1890.00
S.W. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ Sec. 2 Twp. 27 N. R.

10 E. W. M. 3755.00

N. $\frac{1}{2}$ of S.W. $\frac{1}{4}$ Sec. 2 Twp. 27 N. R. 10

E. W. M. 7225.00

N.E. $\frac{1}{4}$ Sec. 2 Twp. 27 N. R. 10 E. W. M. . . 10400.00

Lots 3 & 7 Sec. 35 Twp. 28 N. R. 10 E.W.M. 3805.00

Lots 4 & 6 Sec. 35 Twp. 28 N. R. 10 E.W.M. 2880.00

Lot 5 Sec. 35 Twp. 28 N. R. 10 E. W .M. . . . 1200.00

N. $\frac{1}{2}$ of S.W. $\frac{1}{4}$ Sec 35 Twp. 28 N. R. 10

E. W. M. 6350.00

Personal property on above described

lands. 500.00

Thirty-two (32) Lode Mining Claims situate in
Trout Creek Mining District (unorganized)
Snohomish County, Washington, as follows:

Blue Mud Lode. 12.50

“ “ “ Extension No. 1. 12.50

“ “ “ “ No. 2. 12.50

“ “ “ “ No. 3. 12.50

“ “ “ “ No. 4. 12.50

Five Brothers. 12.50

“ “ “ No. 1. 12.50

“ “ “ No. 2. 12.50

Copper Bullion. 12.50

“ “ “ No. 1. 12.50

“ “ “ No. 2. 12.50

“ “ “ No. 3. 12.50

“ “ “ No. 4. 12.50

Imperial.....				12.50
“	“	No. 1.....		12.50
“	“	No. 2.....		12.50
“	“	No. 3.....		12.50
“	“	No. 4.....		12.50
Judge.....				12.50
“	“	No. 1.....		12.50
“	“	No. 2.....		12.50
New Lone Star.....				12.50
“	“	“	No. 1.....	12.50

[9] \$38,292.50

Forwarded.....\$38,292.50

New Lone Star Extension No. 2.....	12.50
“ “ “ “ No. 3.....	12.50
Nonpareil.....	12.50
“ “ No. 1.....	12.50
“ “ No. 2.....	12.50
“ “ No. 3.....	12.50
Royal.....	12.50
“ “ No. 1.....	12.50
“ “ No. 2.....	12.50
Personal property on said mining claims	100.00
Twenty (20) \$100 shares capital stock of Index-Galena Company, a corpora- tion.....	00.00
Four (4) \$500 first mortgage bonds of Index-Galena Company, a corpora- tion.....	1000.00

Total.....\$39,505.00

In witness whereof we hereunto set out hands at

Seattle, Washington, this 21st day of May, 1915.

JAMES E. BELL.

JOSEPH FERGUSON.

R. J. McLAUGHLIN.

[Indorsed]: Appraisement. Filed this 15th day of May, 1915, at 10 o'clock A. M. C. R. Hawkins, Referee. [10]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 5235.

In the Matter of the NONPAREIL CONSOLI-
DATED COPPER COMPANY, a Bankrupt.

**Certificate of Clerk U. S. District Court to
Supplemental Transcript of Record.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing ten type-written pages numbered from 1 to 10, inclusive, to be a full, true, correct and complete copy of so much of the record in the above and foregoing entitled cause, as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as called for by counsel of record for the Trustee in supplemental praecipe, as the same remain of record and on file in the office of the Clerk of said District Court.

IN WITNESS WHEREOF, I have hereto set

my hand and affixed the seal of said District Court at Seattle, in said District, this 31st day of August, 1915.

[Seal]

FRANK L. CROSBY,

Clerk.

By S. E. Leitch,

Deputy.

[Endorsed]: No. 2624. United States Circuit Court of Appeals for the Ninth Circuit. N. Rudebeck, R. H. Ramsay and Dora A. Ramsay, Petitioners, vs. W. P. Sanderson, as Trustee in Bankruptcy of the Nonpareil Consolidated Copper Company, a Corporation, Bankrupt, and Nonpareil Consolidated Copper Company, a Corporation, Respondents. In the Matter of the Nonpareil Consolidated Copper Company, a Corporation, Bankrupt. Supplemental Transcript of Record on Petition for Revision. Under Section 24b of the Bankruptcy act of Congress, Approved July 1, 1898, to Revise in Matter of Law, a Certain Order of the United States District Court for the Western District of Washington, Northern Division.

Filed September 4, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

**In the United States Circuit
Court of Appeals
FOR THE NINTH CIRCUIT**

N. RUDEBECK, R. H. RAMSAY
and DORA A. RAMSAY,
Petitioners,

VS.

W. P. SANDERSON as Trustee in
in Bankruptcy of the NONPA-
REIL CONSOLIDATED COP-
PER COMPANY, a Corpora-
tion, Bankrupt, and NONPA-
REIL CONSOLIDATED COP-
PER COMPANY, a Corpora-
tion,

Respondents.

No. 2624

**IN THE MATTER OF NONPAREIL CONSOLI-
DATED COPPER COMPANY, BANKRUPT.**

**Upon Review from the United States District Court,
For the Western District of Washington,
Northern Division.**

Brief of Petitioners

E. H. GUIE,
J. A. GUIE,
Attorneys for Petitioners.

810 Leary Building
Seattle, Wash.

**In the United States Circuit
Court of Appeals
FOR THE NINTH CIRCUIT**

N. RUDEBECK, R. H. RAMSAY
and DORA A. RAMSAY,

Petitioners,

VS.

W. P. SANDERSON as Trustee in
in Bankruptcy of the NONPA-
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PER COMPANY, a Corpora-
tion,

Respondents.

No. 2624

IN THE MATTER OF NONPAREIL CONSOLI-
DATED COPPER COMPANY, BANKRUPT.

STATEMENT OF THE CASE.

This is a proceeding to review an order entered by the United States District Court for the Western District of Washington, Northern Division, dismissing certain petitions of N. Rudebeck, R. H. Ramsay and the intervening petition of Dora A. Ramsay filed in the Matter of the Nonpareil Consolidated Copper Co., a Bankrupt, in the said Dis-

trict Court, in which petitions said petitioners prayed for an order vacating the adjudication^{an} bankruptcy of the said Nonpareil Consolidated Copper Company, a Washington corporation.

Petitioners allege that they are respectively stockholders in the said Nonpareil Consolidated Copper Company and were such stockholders previous to and at the time of the filing of the petition in bankruptcy in the said district court; that the said petition in bankruptcy was made and filed without any authorization on the part of the stockholders of said corporation and without notice to the stockholders; that the District Court did not have jurisdiction to make and enter said order of adjudication, on the ground and for the reason that the stockholders of the corporation never authorized the making and filing of the petition admitting insolvency; that the petition in bankruptcy was made and filed in fraud of the petitioners as such stockholders and other stockholders similarly situated, and that the petitioners herein and the other stockholders of said corporation have a subsisting interest as such stockholders in the assets of said corporation; that among the assets of the corporation there are 470 acres of valuable timber land on which there is situated about 32 million feet of timber worth at least \$2.00 per thousand, which the trustee has attempted to sell and that the sale thereof was set for confirmation for June 28, 1915, and unless ordered and restrained by the court the said sale of said assets of said corporation would be confirmed

and said property delivered to the purchaser thereof, to the great loss and detriment of the said corporation and of the petitioning stockholders, N. Rudebeck, R. H. Ramsay and Dora A. Ramsay and other stockholders similarly situated. (Record, pp. 17 to 26.) Upon filing the petitions the court made an order staying the sale of the assets and set a date for the hearing of said petitions. The trustee in bankruptcy thereupon served and filed motions to dismiss the said petitions to vacate the adjudication and also moved to dissolve the restraining order. (Record, p. 36.) The grounds of the motion for dismissal were that it appears from the record and the petitions to vacate that the facts therein stated are insufficient to constitute a valid cause of action or to entitle the petitioners to the relief therein prayed for, or to any relief. Upon hearing being had on said motions, the court entered the order dismissing the petitions to vacate. (Record, p. 37.) This decision and order of the district court the petitioners bring here for review.

SPECIFICATIONS OF ERROR.

The District Court erred in making and entering the order of July 8, 1915, dismissing the said petitions of N. Rudebeck, R. H. Ramsay and the intervening petition of Dora A. Ramsay to vacate the adjudication in bankruptcy and in dissolving the order staying the sale of the assets of said corporation.

BRIEF OF THE ARGUMENT.

I.

The point of law raised by the appellant is that it appears from the face of the record in the bankruptcy proceedings of the Nonpareil Consolidated Copper Company that the adjudication in bankruptcy is void because the stockholders of the corporation never authorized the making or filing of the voluntary petition in bankruptcy wherein the corporation attempts to admit that it owes debts which it is unable to pay in full and prays that it may be adjudicated by the court to be a bankrupt. The petition in bankruptcy was executed by the "Nonpareil Consolidated Copper Company (Seal), By Simon P. Ecki, President." In the verification to the petition made by Simon P. Ecki as such president, he avers that he "was duly authorized by resolution of the board of trustees of the said corporation to execute the foregoing petition for and in behalf of the said corporation for the purposes therein set forth." (Record, pp. 13 to 15.) It therefore clearly appears that the authority to execute the petition came from the trustees. This positive averment precludes any presumption of authorization by the stockholders.

In re Jefferson Casket Co., 182 Fed. p. 689.

It is an established principle of law in this circuit that the board of trustees of a corporation are

without any power to make the necessary admission in writing under Sec. 3a (5), 30 Stat. 546, as amended by Act February 5, 1903, c487, s2 Stat. 797, that the corporation owes debts which it is unable to pay in full and that it is willing to surrender all of its property for the benefit of its creditors. But that this authorization must come from the stockholders.

In re Quartz Gold Mining Co., 157 Fed. p. 243.

In re Southern Steel Co., 169 Fed. p. 702.

Rem. on Bankruptcy, Vol. 2, pp. 278, 279.

In re Bates Machinery Co., 91 Fed. p. 625.

The case of *In re Quartz Gold Mining Co.*, *supra*, involved the construction of the Oregon statutes upon the question as to where was vested the authority to make the necessary written admission of insolvency, and the Court held that the authority rests only in the stockholders.

In the case of *Van Emon et al., vs. Veal*, 158 Fed. p. 1022, this court affirmed the decision *In re Quartz Gold Mining Co.*, *supra*, and say: "We have carefully considered the question involved and find no error in the judgment. Our views are fully expressed in the opinion of the District Court filed in the court below November 18, 1907, and we adopt the same as the opinion of this court. The judgment is affirmed."

The Washington statutes are practically identical with those of Oregon in respect to corporate

action, and method of dissolution and the increase and decrease of capital stock. In Washington the statutes provide the method of dissolution (2 Rem. & Bal. Code, Sec. 3708), namely, by resolution of a two-thirds vote of the stockholders, to-wit:

"Any corporation formed under this chapter may dissolve and disincorporate itself by presenting to the superior judge of the county in which the office of the company is located a petition to that effect, accompanied by a certificate of its proper officers, and setting forth that at a meeting of the stockholders, called for the purpose, it was decided by a vote of two-thirds of all the stockholders, to disincorporate and dissolve the corporation."

* * *

The Oregon statute cited by Judge Wolverton *In re Quartz Gold Mining Co.*, *supra*, Sec. 5070 Misc. Laws Ore (B. & C. Comp.), as amended by Sess. Laws 1903, p. 41, s3, is as follows:

"Any corporation organized under the provisions of this chapter (pertaining to private corporations) may, at any meeting of the stockholders which is called for such purpose, by vote of the majority of the stock of any such corporation, increase or diminish its capital stock, or the amount of the shares thereof, or authorize the dissolution of such corporation, and the settling of its business and disposing of its property and dividing its capital stock in any manner it may see proper."

In Washington corporate stock can only be increased or diminished by a vote of two-thirds of all of the shares of stock of the corporation:

"Any company incorporated under this chapter may, by complying with the provisions herein contained, increase or diminish its capital stock to any amount which may be deemed sufficient and

proper for the purposes of the corporation; but before any corporation shall be entitled to diminish the amount of its capital stock, if the amount of its debts and liabilities shall exceed the sum to which the capital is proposed to be diminished such amount shall be satisfied and reduced so as not to exceed the diminished amount of the capital.

* * *

“Whenever it is desired to increase or diminish the amount of capital stock, a meeting of the stockholders shall be called, by a notice signed by at least a majority of the trustees, and published at least eight weeks in some newspaper published in the county where the principal place of business of the company is located, or if no newspaper is published in the county, then the newspaper nearest thereto in the state, which notice shall specify the object of the meeting, the time and place where it is to be held, and the amount to which it is proposed to increase or diminish the capital, and a vote of two-thirds of all the shares of the stock shall be necessary to increase or diminish the amount of capital stock.” (2 Rem. & Bal., Secs. 3704, 3705.)

The trustees do not have power to declare any dividends except from the net profits, nor can they divide, withdraw, or in any way pay to the stockholders any part of the capital stock, nor reduce the capital stock of the company except in the manner provided by statute, or the articles of incorporation, or by-laws:

“It shall not be lawful for the trustees to make any dividend except from the net profits arising from the business of the corporation, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock of the company unless in the manner prescribed in this chapter, or the articles of incorporation or by-laws; and

in case of any violation of the provisions of this section, the trustees under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the board of directors at the time, or were not present when the same did happen, shall, in their individual or private capacities, be jointly or severally liable to the corporation, and the creditors thereof in the event of its dissolution, to the full amount so divided, or reduced, or paid out: Provided, that this section shall not be construed to prevent division and distribution of the capital stock of the company, which shall remain after the payment of all its debts upon the dissolution of the corporation or the expiration of its charter." (2 Rem. & Bal. Code, Sec. 3697.)

The stockholders form an integral part of a corporation and as such are a part of the company.

Graham v. Boston-Hartford E. R. R. Co.,
118 U. S.; 30 Law Ed. 196.

Quoting from page 205, "the plaintiff and all the shareholders whom he represents form an integral part of the corporation and as such are parties to the bankruptcy proceedings."

Where it appears from the face of the record that there is a lack of jurisdiction the adjudication is a nullity.

3 Rem. on Bankruptcy, 2d Ed., p. 120.

Windsor v. McVeigh, 93 U. S. 274.

In Ex parte Lange, 18 Wall. 163.

Bigelow v. Forrest, 9 Wall. 339.

United States v. Walker, 109 U. S. 258.

In the case of the *New York Tunnel Co.*, 166 Fed. 284, the court said: "Surely if it appears

from the face of the record that the petitioner in bankruptcy is not a bankrupt, so far as this fact is called to the Court's attention, by any person, though a stranger, the Court will act."

II.

Respondent by his motion to dismiss the petitions to vacate will be deemed to have admitted the ^{truth} ~~proof~~ of the allegations of the petitions. Petitioner N. Rudebeck alleges that the making and filing of the petition in bankruptcy was not authorized by the stockholders and that no notice was ever given to the stockholders of any meeting to be held for any such purpose. He alleges in his affidavit in support of the petition that he proceeded diligently to secure a vacation of the adjudication by engaging counsel skilled and learned in bankruptcy law and practice, but was advised by such counsel that the board of trustees and not the stockholders had the power to authorize the admission of insolvency. Petitioner Rudebeck relied on that advice until he filed his said petition to vacate on June 24, 1915. (Record, p. 17.)

Petitioner R. H. Ramsay recites that he is the owner of four thousand shares of the capital stock of the corporation; that the petition in bankruptcy was made and filed without any notice or knowledge and without any meeting of the stockholders, nor was there any notice given by the board of trustees or other authorized persons of any meeting of the stockholders for such purpose or any purpose, and

that said petition in bankruptcy was made and filed without the authorization of the stockholders of said corporation. (Record, p. 24.)

Intervening petitioner Dora A. Ramsay alleges that she is a stockholder and her petition contains substantially the same facts as in the other two petitions relating to lack of notice to stockholders, and that the petition in bankruptcy was filed without authorization from the stockholders. (Record, p. 29.)

The applications to vacate were made to the Hon. Jeremiah Neterer, the judge who made the adjudication in bankruptcy. (Record, p. 16.) He assigned the petitions to vacate for hearing to Hon. Edward E. Cushman, one of the judges in the same district, who entered the said order dismissing the said petitions to vacate. (Record, p. 38.)

We believe that with all of the allegations of no notice to the stockholders and the lack of authorization for the making and filing of the petition in bankruptcy, which allegations stand admitted, and from the further fact that it affirmatively appears from the petition in bankruptcy that the stockholders never authorized the filing of said petition, that the district court should have denied the motions to dismiss and should have vacated the adjudication in bankruptcy of the Nonpareil Consolidated Copper Company.

Respectfully submitted,

E. H. GUIE,

J. A. GUIE,

Attorneys for Petitioners.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

N. RUDEBECK, R. H. RAMSAY
and DORA A. RAMSAY,
Petitioners,
vs.

W. P. SANDERSON as Trustee in
Bankruptcy of the NONPAREIL
CONSOLIDATED COPPER COM-
PANY, a Corporation, Bankrupt,
and NONPAREIL CONSOLI-
DATED COPPER COMPANY,
a Corporation,
Respondents.

No. 2624.

**In the Matter of Nonpareil Consolidated Copper
Company, a Bankrupt**

Upon Review from the United States District Court,
for the Western District of Washington,
Northern Division.

BRIEF OF RESPONDENTS

WM. HICKMAN MOORE,
Attorney for Respondents.

41 Haller Building,
Seattle, Washington.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

N. RUDEBECK, R. H. RAMSAY
and DORA A. RAMSAY,
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IN THE
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DATED COPPER COMPANY,
a Corporation,
Respondents.

No. 2624.

**In the Matter of Nonpareil Consolidated Copper
Company, a Bankrupt**

Upon Review from the United States District Court,
for the Western District of Washington,
Northern Division.

STATEMENT OF THE CASE.

The bankrupt is a corporation organized and existing under and by virtue of the laws of the State of Washington, and was engaged in the business of mining ore (Record p. 13).

February 27, 1914, the petitioner, Nicholas Rudebeck, obtained judgment against the bankrupt

in the Superior Court of the State of Washington for Snohomish County, for the sum of Nine Thousand and Two Hundred Seventy and 55/100 Dollars (\$9,270.55), with interest thereon until paid (Supp. Record p. ~~3-3~~).

February 28, 1914, the bankrupt filed its petition in the District Court for the Western District of Washington, Northern Division, praying that it be adjudicated a bankrupt. In the body of the petition it alleges:

“* * * That it owes debts which it is unable to pay in full; that it is willing to surrender all its property for the benefit of its creditors, except such as is exempt by law, and is desirous of obtaining the benefits of the Acts of Congress relating to bankruptcy; *and its Board of Directors has duly authorized such acts on its part,*”

and, in the verification, its president affirms that he

“was duly authorized by resolution of the Board of Trustees of said corporation to execute the foregoing petition for and in behalf of said corporation for the purposes therein set forth” (Record pp. 14 and 15).

March 4, 1914, the adjudication of bankruptcy was made and entered (Record p. 16).

March 23, 1914, the petitioner, Nicholas Rudebeck, proved and filed his judgment as a claim against the bankrupt (Supp. Record pp. ~~1-1~~).

August 21, 1914, the claim of John P. Hoyt, as former Referee in Bankruptcy, was allowed by the court in the sum of Sixteen and 20/100 Dollars (\$16.20) (Supp. Record pp. 4-5).

November 30, 1914, an order to pay premiums on the bonds of the trustees amounting to Fifteen Dollars (\$15.00) was made by the court (Supp. Record p. 5-6).

April 29, 1915, three appraisers were appointed and qualified (Supp. Record p. 6-7).

May 15, 1915, an appraisalment of the property of the bankrupt was filed (Supp. Record pp. 8-11).

June 3, 1915, an order was entered by the court allowing and directing the payment of Fifty-six and 10/100 Dollars (\$56.10) to each of the appraisers (Supp. Record p. 7-8).

The petitions of Nicholas Rudebeck and R. H. Ramsay and the intervening petition of Dora A. Ramsay, to vacate the adjudication were filed June 24, 1915, June 29, 1915, and July 8, 1915, respectively (Record pp. 17-31).

The appraisalment shows the bankrupt to be the holder of thirty-two unpatented mining claims; and the court will take judicial notice of the fact that the trustee must do the assessment work there-

on, as well as pay taxes on the other property of the bankrupt, and also incur heavy obligations and make large expenditures for the care, custody and preservation of its estate.

BRIEF OF THE ARGUMENT.

I.

Petitioners' first point is that it appears upon the face of the record that the District Court did not have jurisdiction to make the adjudication and is based upon the premise that a Washington corporation cannot commit the 5th Act of Bankruptcy through its trustees but only through its stockholders. In taking this position, they assume that an adjudication in bankruptcy *ipso facto* works a dissolution of the corporation, and cite statutes and cases in its support.

(a) There is nothing in the language of the bankruptcy act to prevent the corporation from resuming its business and the exercise of all of its corporate functions after it shall have obtained a discharge; and, so long as that is possible, it cannot, with any propriety, be said that the corporation is dissolved.

Morley vs. Thayer, 3 Fed. 737, 743;

Chemical National Bank vs. Hartford Deposit Co., 161 U. S. 1;

State vs. Merchant, 37 Ohio St. 251.

This view has been expressed by the Supreme Court of Georgia in the following language:

“The bankruptcy of a corporation does not put an end to its corporate existence nor vacate the office of its directors. A corporation of this state cannot be dissolved by an act of Congress, nor by the administration thereof through the Federal Courts. Georgia created, and she alone can destroy. Besides, it is not the policy of the bankruptcy law to dissolve corporations. The assets are seized, but the franchise is spared. ‘Your money’, and not ‘your life’ is the demand made by the bankruptcy act.”

60 Ga. 174

The same view has been maintained by the courts in considering the effect of proceedings under the state insolvency and receivership laws, upon the existence of corporations.

Coburn vs. Boston, etc. Co., 10 Gray (Mass.) 243;

Boston, etc. vs. Longdon, 24 Pick. (Mass.) 49;

Stolze vs. Manitowoc, etc. Co., 100 Wis. 208;

Moseby vs. Burrow, 52 Texas 396;

Valley Bank vs. Sewing Soc., 28 Kansas 423;

Hasselman vs. Japanese, etc., Co., 2 Indiana App. 180;

In re Marshall Paper Company, 102 Fed. p. 872;

Sigua Iron Vo. vs. Brown, 171 N. Y. 494, 64 N. E. 194.

If the contention of the petitioners that the adjudication in bankruptcy works a dissolution of the corporation be true, then no judgment could be taken against it by the creditors for the purpose of determining the liability of stockholders after its discharge, (*In re Marshall Paper Co., supra*); nor could it affect a composition with its creditors and resume possession of its property and proceed with the conduct of its business.

(b) The board of trustees have power to commit the 5th Act of Bankruptcy without authorization of the stockholders. Under the laws of Washington "The corporate powers of a corporation shall be exercised by a board of not less than three trustees" (*Rem. & Bal. Sec. 3686*). The Supreme Court of Washington has held that the trustees of a corporation may make a general assignment for the benefit of creditors.

Nyman vs. Berry, 3 Wash. 734;

McKay vs. Elwood, 12 Wash. 579;

Cerf & Co. vs. Wallace, 14 Wash. 249.

The Circuit Court of Appeals for the Second Circuit says:

“It would seem to be reasonable to hold that the power to make the admission in writing could be exercised by the same officers who have power to make a general assignment, and, in the absence of statute or by-law regulating the subject, such power resides in the directors.”

In re C. Moench & Sons Co., 130 Fed. 685.

“A board of directors ought to have the power to put the company into bankruptcy. They have care of the general business of the corporation. They are the persons who know whether the corporation is able to go on or not. It might very well happen that under the articles and by-laws of the corporation it would be impossible to hold a meeting of the stockholders for months. Under these circumstances the bankruptcy of the corporation might be delayed so long that in many cases the purposes of the bankrupt law would be defeated and preferences given.”

In re Kenwood Ice Co., 189 Fed. 525; 204 Fed. 577.

“It is not to be presumed that there will be found in the general laws of the state, or in the articles of incorporation or by-laws, any express provision authorizing such admission; but, under the general law, the board of directors or trustees of the corporation have the power to authorize execution of an assignment of all property of the corporation for the benefit of its creditors, when such a step is advisable, unless such an assignment is prohibited by law, the articles, or by-laws. *Clark*

& Marshall on Private Corporations, par. 691;
Thompson on Corporations, (2d Ed.) Sec.
 6138."

Home Powder Company vs. Geis, 204 Fed.
 568.

Trustees have power to put the corporation into
 bankruptcy.

In re Foster Paint and Varnish Co., 210 Fed.
 652;

In re Lisk Mfg. Co., 167 Fed. 411.

We have been unable to find any case denying
 the power of the trustees to put the corporation
 into bankruptcy under laws similar to those of the
 State of Washington. The cases are cited and dis-
 cussed in our citations above and we will not review
 them further.

In re Jefferson Casket Company, 182 Fed. 689,
 cited by petitioners, simply holds that the president
 of a corporation cannot put the corporation into
 bankruptcy without the authorization of the trus-
 tees, and seems to concede that the trustees would
 have such power.

In re Southern Steel Company, 169 Fed. 702,
 does not deny the power of the trustees, but merely
 holds that the resolution passed by the board of
 trustees did not authorize their attorney at law to
 commit the act of bankruptcy.

In re Bates Machinery Co., 91 Fed. 625, Judge Lowell bases his decision upon the statutes of Massachusetts, which provide that no conveyance or mortgage of corporate real estate, or lease thereof for more than one year, shall be made unless authorized by vote of the stockholders at a meeting called for the purpose, and that corporations similar to the Bates Company might apply by petition signed by an officer duly authorized by a majority of the corporators present and voting at a legal meeting called for the purpose, for the initiation of proceedings in insolvency against the corporation. He concedes, however, that prior to the enactment of these laws the Supreme Judicial Court of Massachusetts had held that the directors of an insolvent corporation were authorized to make a general assignment of its property for the benefit of its creditors (*Sargent vs. Webster*, 13 Mete. 497); and also that at this time it is pretty well settled by authority, that, under ordinary statutes or charters, the authority to make a general assignment inheres in the board of trustees.

In re Quartz Gold Mining Company, 157 Fed. 243, Judge Wolverton bases his decision upon the statute of Oregon providing for the dissolution of corporations.

Some point seems to be made by petitioners that the meeting of the trustees was held outside the State of Washington, but this is permitted by Sec. 3690 of *Rem. & Bal. Code*, as follows:

“A meeting of the board of trustees or directors of corporations, organized and existing under the laws of this state, may be held at such place or places within or without the state as may be designated in the articles of incorporation or by-laws.”

II.

The petitioners are barred, by laches, of their right to vacate the adjudication. The adjudication, when made, imports the existence of all requisite jurisdictional facts, and it must affirmatively appear in the petition that the court *did not* have jurisdiction; for the silence of the petition on the jurisdictional facts is different from affirmative showing thereon that the jurisdictional facts *did not* exist.

In re Almira Steel Co., 109 Fed. 456;

Edelstein vs. U. S., 149 Fed. 636;

In re First National Bank, 18 A. B. R. 271;

Dodge vs. Kenwood Ice Co., 189 Fed. 525.

Default adjudication of a corporation will not be vacated merely because the petition fails to show that it was a corporation of the class subject to

bankruptcy, at any rate where the petition does not show that it was *not* of such class.

Dodge vs. Kenwood Ice Co., supra.

In re First National Bank of Belle Fourche,
18 A. B. R. 271, the court says:

“The petition contained no statement that Widell corporation was not engaged principally in the manufacturing pursuit and no showing that the court was without jurisdiction of the case; but it set forth the substance of a good cause of action, and it was impregnable after the adjudication.”

Where the allegations are sufficient and the lack of jurisdiction is only provable by evidence, dehors the record, it is clear that laches may bar the right to move for a vacation of the adjudication.

In re New England Breeder's Club, 169 Fed. 586.

Now it appears from the record that the adjudication in this case was made on the 4th day of March, 1914; that the petitioner, Rudebeck, presented his claim against the estate of the bankrupt on March 23, 1914; that the petitioners, Ramsay, are residents of the State of Washington and knew of the adjudication as early as February, 1915, and that none of them sought to vacate the adjudication until the latter part of June, 1915, more than fifteen months after the adjudication. In the meantime

the trustees, under the direction of the court, had proceeded with the administration of the estate of the bankrupt to the point of selling its assets. Such laches under all of the authorities will bar the right of the petitioners to attack the adjudication, particularly where it appears upon the record that should the adjudication be vacated the judgment of the petitioner Rudebeck would become a lien upon the property of the bankrupt and thereby give him a preference, and this we apprehend is the sole object of the attack on the adjudication.

In re First National Bank, 152 Fed. 64, the Circuit Court of Appeals for the Eighth Circuit held that there was no abuse of discretion in a denial of a motion by creditors to vacate the adjudication of the bankruptcy of a corporation where the motion was first made seven weeks after the petition was filed and receivers appointed, and five weeks after the adjudication, when the creditors were aware of the filing of the petition within forty-eight hours thereafter, and the administration of the estate had proceeded without objection meanwhile.

In re Ives, 113 Fed. 911, the Circuit Court of Appeals for the Sixth Circuit held that a petition to vacate the adjudication could not be maintained after the lapse of eight months during which other

rights had intervened, and that an allegation that the facts stated in the petition have become known to him "only recently", is insufficient.

In re Niagra Contract Company, 127 Fed. 872, it was held that where lack of jurisdiction did not appear on the face of the petition, the application to vacate the adjudication should be promptly made, the court using language quite applicable to this case as follows:

"The facts appearing on argument and by the affidavit of the trustee tending to show another motive for this application are not such as to predispose looking with favor upon this creditor's request to set aside the adjudication," and we do not think that this court should look with favor upon the application herein when it considers that the result, if not the motive, would be to give the petitioner Rudebeck a preference over other creditors of the bankrupt.

The unexplained delay of the petitioners in this case disentitles them, as a matter of right, to any vacation of the adjudication.

In re Urban and Suburban Realty Co., 132 Fed. 140.

The fact that preferences might be given was one of the principal reasons assigned for holding that the trustees of a corporation could commit the

Fifth Act of Bankruptcy in *In re Kenwood Ice Co.*,
189 Fed. 525, 204 Fed. 577.

It would seem also that the proving of his claim is such an acquiescence as will bar the petitioner Rudebeck from the right to move for a vacation of the adjudication for want of jurisdiction.

In re New York Tunnel Company, 166 Fed.
284;

In re Worsham, 142 Fed. 121.

We respectfully submit that the order of the District Court dismissing the petitions should be affirmed, and that, should this Honorable Court decide otherwise, the matter be remitted to that court with leave to answer and set out in full all of the facts relating to the proceeding including petitioner Rudebeck's connection therewith, and the obligations incurred and expenditures made by the trustee and his attorney in the administration of the estate of the bankrupt.

WM. HICKMAN MOORE,
Attorney for Respondents.

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In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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and DORA A. RAMSAY,
Petitioners,

VS.

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PER COMPANY, a Corpora-
tion, Bankrupt, and NONPA-
REIL CONSOLIDATED COP-
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No. 2624

IN THE MATTER OF NONPAREIL CONSOLI-
DATED COPPER COMPANY, BANKRUPT.

Upon Review from the United States District Court,
For the Western District of Washington,
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Reply Brief of Petitioners.

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Replying to the statement contained in Respondents' Brief on page 8 that "the Supreme Court of Washington has held that the trustees of a corporation may make a general assignment for the benefit of creditors," we desire to state that the Supreme Court of Washington has never passed upon the question as to whether the authority rests in the stockholders or trustees to authorize the making of an assignment for the benefit of creditors. Nor do the Washington cases cited by respondents sustain the statement that the trustees may make the assignment.

In the case of *Nyman v. Berry*, 3 Wash. 734, there is no mention made as to who authorized the assignment.

McKay v. Elwood, 12 Wash. ⁵⁷⁹~~679~~, was an action to recover upon an unpaid subscription to corporate stock and it is stated in the opinion that the corporation made an assignment of all of its assets to a trustee for the benefit of its creditors, "Which deed of assignment was executed in pursuance of a resolution of the board of directors of said corporation *acting under authority and direction of its stockholders.*"

In the case of *Cerf & Co. v. Wallace*, 14 Wash. 249, it is simply stated in the opinion that the corporation made an assignment for the benefit of its creditors. It does not appear under what authority the assignment was made, whether by resolution of the stockholders or trustees.

Judge Neterer, in the District Court of the United States, for the Western District of Washington, Northern Division, in the matter of Kitsap Title Abstract Co., Bankrupt, No. 5232, on a petition to vacate the adjudication in bankruptcy on the ground that the making and filing of the petition in bankruptcy admitting the inability of the corporation to pay its debts, was not authorized by the stockholders, held that under the Washington statutes such authority rests only in the stockholders. We do not find this case reported in the Federal Reporter but make reference to it, and state further that it is now the rule and practice in Judge Neterer's Court that a corporation's voluntary petition in bankruptcy must be accompanied by a certified copy of the resolution of the stockholders authorizing the making and filing of the petition admitting the inability of the corporation to pay its debts under Sec. 3a (5), 30 Stat. 546, as amended by Act February 5, 1903, c487, 32 Stat. 797.

Respondents do not have the temerity to contend or claim that the stockholders did authorize the execution and filing of the petition in voluntary bankruptcy. They maintain that the board of trustees of a corporation under the Washington statutes possess that power. They attempt to support their contention by referring to decisions of other circuits involving the construction of corporate laws dissimilar to those of Oregon and

Washington. If the Court should determine that the stockholders and not the trustees have this requisite authority, respondents then ask that it be held that the petition to vacate cannot be considered because the petition in bankruptcy is silent as to whether or not the stockholders authorized the procedure. And this in the face of the positive allegation in the petition in bankruptcy that "*its board of directors has duly authorized such acts on its part.*"

The petition *In re Quartz Gold Mining Co.*, 157 Fed. 244, simply recites that by resolution adopted by its board of directors the corporation admitted in writing its inability to pay its debts and its willingness to be judged a bankrupt. To which a demurrer was sustained.

In Re Jefferson Casket Co., 182 Fed. 689, no proper authorization was alleged in the petition and the court held that no jurisdiction was conferred.

II.

It is alleged in the petitions to vacate the adjudication in bankruptcy that no notice was ever given to the stockholders by the calling of a meeting for the purpose of authorizing the execution of the petition in bankruptcy and that no meeting of the stockholders was ever held for such purpose; that the trustees at all times were absent from the State of Washington and do not, and did

not, reside in the State of Washington. These allegations stand admitted under respondents' motion to dismiss and it seems to us that the petitioning stockholders should have their day in Court and an opportunity to prove the allegations of their petition to vacate, if the Court should find that the lack of jurisdiction does not appear from the face of the record.

Respectfully submitted,

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J. A. GUIE,

Attorneys for Petitioners.



